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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ALABAMA HIGHWAY DEPARTMENT,
Petitioner,

vs.

SHIRLEY ANN BOONE, as Administratrix of the
Estate of VERNON DALE BOONE, JR.,
SHIRLEY ANN BOONE, individually;
SHIRLEY ANN BOONE on behalf of KELLEY LEE BOONE,
the minor child and dependent of VERNON DALE BOONE, JR.;
SOUTHERN RAILWAY COMPANY;
THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY;
NORFOLK SOUTHERN CORPORATION; and
CITY OF LEEDS, ALABAMA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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QUESTION PRESENTED

Are documents compiled in connection with highway safety improvement projects which by Congressional mandate under 23 U.S.C. § 409 "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages" nevertheless discoverable?

PARTIES BELOW

Parties in the Supreme Court of Alabama were petitioner State of Alabama Highway Department and respondents Southern Railway Company; Norfolk Southern Corporation; The Alabama Great Southern Railroad Company; Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr., deceased; Shirley Ann Boone, individually; Shirley Ann Boone, on behalf of Kelley Lee Boone, minor child of Vernon Dale Boone, Jr.; and City of Leeds, Alabama.

Subsidiaries and related corporations of Norfolk Southern Corporation, Southern Railway Company, whose name has been changed since the proceeding below to Norfolk Southern Railway Company, and The Alabama Great Southern Railroad Company include Norfolk and Western Railway Company; Atlanta and East Carolina Railway Company; Camp Lejeune Railroad Company; Central of Georgia Railroad Company; Chesapeake Western Railway; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Georgia Northern Railway Company; Georgia Southern and Florida Railway Company; Live Oak, Perry and South Georgia Railway Company; New Orleans Terminal Company; State University Railroad Company; North American Van Lines; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; and Triple Crown Services, Inc.

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CITY OF LEEDS, ALABAMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

Petitioner State of Alabama Highway Department prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Alabama, reported at 572 So. 2d 389, is printed in the Appendix at page A-1. The unreported order of the Jefferson County, Alabama, Circuit Court is printed in the Appendix at page A-3.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered September 21, 1990. A-1. The timely petition for rehearing of petitioner State of Alabama Highway Department was overruled by the Supreme Court of Alabama on December 7, 1990. A-4-5. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

The focus of this petition for certiorari is 23 U.S.C. § 409, which provides:

> Admission as evidence of certain reports and surveys. Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Related statutes include 23 U.S.C. §§ 130, 144, and 152, which are set forth in the Appendix at page A-6.

STATEMENT OF THE CASE

The lawsuit underlying this petition was filed on December 9, 1988, by Shirley Ann Boone, individually, and as Administratrix of the Estate of Vernon Dale Boone, Jr., and by Shirley Ann Boone on behalf of Kelley Lee Boone, the minor child of Vernon Dale Boone, Jr. The defendants include Southern Railway Company, The Alabama Great Southern Railroad Company, Norfolk Southern Corporation, and the City of Leeds, Alabama. The petitioner State of Alabama Highway Department is not a party to the underlying lawsuit.

The accident which is the basis of the underlying lawsuit occurred on August 28, 1988, and involved a collision between a train operated by Southern Railway Company and a tractor trailer truck operated by Vernon Dale Boone, Jr., at a railway-highway grade crossing in Leeds, Alabama, on Southern Railway Company's mainline track from Birmingham, Alabama, to Atlanta, Georgia. Boone was killed in the accident.

A. Stage in the Proceedings.

The question concerning which this petition for certiorari is being filed was raised during the process of discovery, which has not been completed pending the outcome of this petition. The underlying lawsuit has not yet been tried.

The Supreme Court of Alabama issued its opinion regarding the question in this petition on September 21, 1990, and overruled the State of Alabama Highway Department's timely petition for rehearing on December 7, 1990.

B. Manner in Which the Federal Question was Raised in the Trial Court and the Supreme Court of Alabama and the Rulings of Those Courts.

On February 9, 1990, the plaintiffs in the underlying lawsuit subpoenaed the State of Alabama Highway Department's entire file on the railroad crossing where the accident made the basis of the underlying lawsuit occurred. A-22. On March 2, 1990, the State of Alabama Highway Department objected to the subpoena, citing 23 U.S.C. § 409 as the basis for the objection.[1] A-24.

In response to the plaintiffs' motion to compel, the Jefferson County Circuit Court ordered the Highway Department to produce the requested documents, stating:

> Plaintiff's Motion to Compel directed to Alabama Highway Department is, after argument, and a determination by this Court

[1] The Highway Department agreed to produce certain documents contained in its file which are not within the ambit of Section 409.

> for the second time,[2] to construe the wording of 23 U.S.C. § 130[3] [sic, 409], (specifically the phrase, " . . . or considered for any other purposes . . .") to mean a bar as to admissibility and/or consideration by any court, tribunal or body which is empowered to "consider" evidence and law, in arriving at a finding; however, it is the finding of this Court that the word "consider" as is employed in 23 U.S.C. § 130 [sic, 409], does not contemplate or operate as a bar to, the discoverability only of materials the subject of said United States Code Section. Hence, Motion Granted and the Alabama Highway Department is given thirty (30) days to respond.

Order of Jefferson County, Alabama, Circuit Court, March 30, 1990. A-3.

The Highway Department then filed a Petition for Writ of Mandamus to the Supreme Court of Alabama on April 27, 1990, seeking a writ of mandamus "compelling the Circuit Court of Jefferson County to enter an order that 23 U.S.C. § 409 bars the discovery of the documents designated in plaintiffs' subpoena to which it objected to producing." The Alabama Supreme Court denied the petition for writ of mandamus on September 21, 1990, and overruled the timely petition for rehearing on December 7, 1990.

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[2] The trial court had earlier rejected the contention by Southern Railway Company that its crossing file was privileged and protected from discovery by 23 U.S.C. § 409, requiring the production of any such documents.

[3] 23 U.S.C. § 130 is set forth in Appendix D. The portion of 23 U.S.C. § 130 which is most pertinent to this petition is paragraph (d), which provides:

> Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

The Alabama Highway Department compiled the documents sought by plaintiffs in this case pursuant to this statute. Section 409 provides a privilege from discovery for such documents.

In denying the petition for writ of mandamus, the Alabama Supreme Court stated:

> The petition for a writ of mandamus is denied on the condition that the production of the requested records be made *in camera*, so that the trial court can determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial.

This order plainly rejects the privilege provided by 23 U.S.C. § 409 and requires that documents determined by Congress to be privileged must be considered by the trial court and produced, if "germane," in an action for damages. This conflict with federal law was recognized by the strong dissent offered by three of the nine justices of the Alabama Supreme Court:

> I would grant the writ in this case, because I don't believe that the records sought are properly discoverable.
>
> The writ of mandamus sought by the State of Alabama Highway Department's petition should be issued, because 23 U.S.C. § 409 provides a privilege for the documents described in § 409 and that privilege is a complete bar to the admissibility or discovery of such documents. In addition, the purpose behind 23 U.S.C. § 409 requires the documents described in § 409 to be protected from disclosure. Section 409 prohibits both the admissibility and the discovery of all documents described in the statute. This conclusion is mandated by the language of the statute itself, by opinions interpreting the statute, and by a comparison with other similar statutes and decisions interpreting those statutes.
>
> Although I recognize that material can be discovered if it will lead to the discovery of admissible evidence, it is clear that privileged information is not subject to discovery. Because I believe that the information sought to be discovered here is privileged, I would grant the Alabama Highway Department's petition for writ of mandamus; consequently, I must repectfully dissent.

572 So.2d at 389, A-2.

REASONS FOR GRANTING THE WRIT

The holding of the state court below rejects the authority and clear meaning of and creates a conflict with a federal statute, 23 U.S.C. § 409. Section 409 precludes both the admissibility and discovery of documents within its scope. By holding that Section 409 does not provide a privilege from discovery for documents within the purview of the statute, the decision has created a situation where documents described in Section 409 are privileged in Alabama if the litigants are in federal court,[4] but are not privileged if the litigants are in state court. The Alabama Highway Department is caught in the cross fire, and can only be rescued by this Court.

The meaning of Section 409 has also been considered by several courts outside Alabama, both state and federal, with conflicting results. The federal question before this Court is crucial to states and highway departments throughout the United States and needs to be settled by this Court. Decisions which reject the privilege provided by Section 409 are incorrect, violative of the plain meaning of the statute, and cannot be permitted to stand. Courts must not be allowed to revise federal law simply because they do not agree with it.

Simply stated, the issue before this Court is whether the privilege from discovery contained in 23 U.S.C. § 409 must be recognized by all courts, or only by those courts which agree with the policy behind the law. The Alabama Supreme Court rejected the plain meaning of the statute and ruled that Section 409 does not make the documents described therein privileged from discovery. Other courts have taken a similar position. This Court should correct this error.

1. The Alabama Supreme Court's Rejection of the Privilege Provided by 23 U.S.C. § 409 Conflicts with Unambiguous Federal Law.

Section 409 was enacted by Congress in 1987 in response to concerns that states could not accumulate the data they needed to

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[4] *See Bearden v. Southern Railway*, CV-PT-0005-S, slip op. (N.D. Ala. July 11, 1988) (memorandum opinion) (A-35, discussed *infra* at pp. 7-8).

identify, evaluate and plan highway safety improvements without some assurance that the data would be protected both from discovery and from being admitted into evidence during trials. State employees and other persons from whom states gather information regarding hazardous highway conditions were concerned that they might become embroiled in or subject to litigation as a result of their reports and surveys unless Congress provided them with protection.

By enacting Section 409, Congress acted to provide states and other persons with the protection which was necessary to encourage candid assessments of particular highway conditions. By its express language, Section 409 prohibits admissibility of the documents described in the statute: "reports . . . shall not be admitted into evidence in Federal or State court . . . in any action for damages. . . ."

The question which this Court should answer is whether the phrase in Section 409 "shall not be . . . considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data" is a bar against the *discovery* of the documents described in the statute. Careful analysis of this phrase leads to the conclusion that it *must* be a privilege against discovery. That the statute prevents the *admissibility* of described documents is not questioned and is not before this Court. While the plain language of the statute would appear to answer the question regarding discovery clearly, the Alabama Supreme Court has reached a contrary conclusion. This erroneous decision has created a conflict with federal law, thereby raising serious questions of judicial usurpation of the legislative function of Congress.

II. The Question Presented Involves a Conflict Within the State of Alabama and Among Other State and Federal Courts.

Based on existing decisions, whether documents described by Section 409 are considered privileged in the state of Alabama depends on whether the litigants are in state or federal court. Under the decision of the Alabama Supreme Court, the documents are not privileged if the litigants are in state court. However, under *Bearden v. Southern*

Railway Company, CV88-PT-0005-S, slip op. (N.D. Ala. July 11, 1988) (memorandum opinion) (A-35), the documents are privileged if the litigants are in federal court. The court in *Bearden* declared: "The plain language of Section 409 precludes data related to railroad-highway crossings from being admitted or considered for other purposes. The conclusion that the phrase 'for other purposes' includes discovery is a logical one.' " Slip op. at 2-3.

Whether documents are privileged under federal law obviously should not depend upon the forum; it should depend on the meaning of the federal law. Under federal law, documents within the ambit of Section 409 are unquestionably privileged. The conflict within the state of Alabama should be resolved.

Moreover, there is a conflict among other state and federal courts as to whether documents within Section 409 are privileged from discovery. For example, the United States District Court for the Northern District of Ohio rightly agreed with *Bearden* and found that the language of Section 409 "is easily broad enough to encompass a prohibition on discovery." *Neely v. Consolidated Rail Corporation*, No. 5:89CV0531, slip op. at 6 (N.D. Ohio, January 8, 1990) (A-39). The court in *Neely* noted that 23 U.S.C. § 409 "on its face, may be read to prohibit the discovery of materials prepared by the defendant Conrail for the purposes designated by that section." *Id.* at 6. Continuing, the court declared: "[T]he statute on its face applies to any reports, surveys, etc., compiled for the purpose identified by the statute without regard to the preparing entity." *Id.* That is, the materials described in and governed by Section 409 are protected from disclosure or discovery whether those documents are prepared by or in the hands of a State, a railroad, or any other person or entity.

Other courts which have agreed that Section 409 provides a privilege which prevents the discovery of the documents which come within the statute include *Nelson v. Southern Railway Company*, Colbert County, Alabama, Circuit Court, CV 86-230, slip op. (January 27, 1988) (A-46) (the court ruled "that Rule 26 of ARCP concerning discovery is superseded" by Section 409); and *Singer v. Southern Railway Company*, 87 CVS 8959, 88 CVS 3898, slip op. at 4, General Court of

Justice, Superior Court Division, North Carolina (June 26, 1989) (A-48) (documents described in Section 409 are "protected from admission into evidence as well as discovery by 23 U.S.C. § 409, and that the disclosure or admission into evidence of such documents would constitute a violation of federal law, and that such federal law preempts the state common law allowing discovery and/or admission of such information.").

On the other hand, some courts have held that while Section 409 forbids the admission into evidence of the described documents, it does not provide a privilege from discovery. Illustrative of this position is the New York Court of Claims, which rejected the argument that 23 U.S.C. § 409 protects the documents described therein from discovery. That court explained:

> In our view, the purpose of the statutory protection was merely to keep the record-keeping required by Federal funding provisions from providing an additional, virtually no-work, tool for direct use in private litigation. The statute expressly makes the 'reports, surveys, schedules, lists, or data compiled' inadmissible as evidence; it does not, expressly or by implication, make the information contained in such reports confidential. Accordingly, we follow the courts of Louisiana and Indiana and hold that, as it interacts with the law governing discovery in New York, 23 U.S.C. § 409 does not prohibit discovery of the reports and other documents that the statute makes inadmissible as evidence.

Light v. State of New York, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). *See also Hagerty v. Southern Railway Company*, 133 F.R.D. 34, 35 (E.D. Mo. 1990) (quoting and following *Light*); *Indiana Department of Transportation v. Overton*, 555 N.E.2d 510, 512 (Ind. Ct. App. 1990) ("although [23 U.S.C. § 409] makes the enumerated documents inadmissible and unavailable for consideration by a factfinder during a trial for damages, [it] does not declare the documents privileged or require that they be kept confidential."); *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435, 439 (La. Ct. App. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3164, 104 L.Ed.2d 1027 (1989) (reasoning that "[t]he phrase 'consid-

ered for other purposes. . . .' preceded by language referring to admissibility of evidence, implies a finder of fact. A finder of fact *considers* testimony and documentary evidence. We believe that the catch-all phrase was meant to include *any other trial use* of the enumerated documents; that is to say, that for purposes of the finder of fact, the documents prohibited by 23 U.S.C. § 409 do not exist. They may not be referred to by counsel, and they may not be used for impeachment purposes. They are, however, discoverable. . . .").

The conflict manifested by the foregoing decisions and the rulings which reject the privilege provided by Section 409 make this Court's consideration of Section 409 necessary and urgent.

III. The Alabama Supreme Court's Rejection of the Privilege Provided by 23 U.S.C. § 409 Frustrates the Congressional Purpose as Stated in 23 U.S.C. § 409.

States have certain responsibilities with respect to highway safety and improvement under 23 U.S.C. §§ 130, 144 and 152. The fulfillment of these responsibilities requires the accumulation of numerous reports, surveys, schedules, lists and other data. Obviously, these documents must come from sources both inside and outside government, including such entities as railroads.

In order for states properly to identify, evaluate and plan "the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings," persons from whom data is requested must know they can communicate honestly and candidly without fear of being embroiled in or subject to litigation. Moreover, highway department employees must feel free to evaluate specific highway problems without concern that a frank note or memorandum may subject them to potential involvement or even liability in a future lawsuit. The tasks given the highway departments of this country do not include preparing "proofs" for plaintiffs to use at trial or in preparation for trial, but do include making the highways of our land as safe as possible. This task can best be carried out through a process of open communication and recognition of hazardous situations.

In passing Section 409, Congress recognized these concerns on the part of states and state highway departments. Many states were afraid that the data they collected for the purpose of identifying and prioritizing highway hazards could be obtained and used against them in lawsuits. Quite simply, state highway departments wanted to obtain the most information available to carry out their required duties, but understood the process was being frustrated by their own reluctance and the reluctance of others beeause of the likelihood that acknowledgment of hazardous conditions or conditions which might be improved might expose them to liability.

23 U.S.C. § 409 was enacted to remove these obstacles to the accomplishment of the purposes of the Federal Highway Safety Acts. Orders such as was entered by the Alabama Supreme Court in this case frustrate the intended purpose of Section 409 and jeopardize the entire federally mandated program regarding highway safety. This error should be corrected by this Court. The legislative history of Section 409 reveals that the purpose of Section 409 was to encourage full and frank disclosure of information between states, railroads, and other parties and to protect state employees from the threat of litigation.[5]

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[5] In 1983, the United States Department of Transportation noted:

> For the past several years, we have attempted to include in the Department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152, for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability.

Internal Memorandum, United States Department of Transportation, Federal Highway Administration, from Marshall Jacks, Jr., to D. L. Ivers (May 4, 1983) (regarding Proposed Amendment to Highway Safety Legislation) (A-57). After proposing a statute similar to Section 409, the memorandum states:

> It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of Federal-aid highway programs to eliminate or reduce hazardous roadway conditions. (e.g. 23 USC 152 and Sec. 203 of the Highway Safety Act of 1973). It is also the intent to protect information that may be

(Footnote 5 continued on next page)

The House Committee, in reporting its bill (House Report 99-665, July 2, 1986) described the section:

> Section 209-Use of Certain Reports As Evidence. This section prohibits the introduction into evidence of any priority listing of roadside or railroad-highway crossing hazards prepared pursuant to section 152 of title 23, United States Code (hazard elimination), and section 203 of the Highway Act of 1973 (Railroad-Highways Crossings). *This is to encourage greater accuracy and completeness in the compilation of such lists, by preventing these lists from being used in any judicial proceeding thereby improving their quality as a basis for programming.*

(House Report, at 56) (emphasis added). The Senate Report (No. 100-4, January 27, 1987) described it as follows:

(Footnote 5 continued)

> compiled by railroads or utility companies for States in identifying hazards in connection with these programs. Precedent for such protection is found in Sec. 220(f) of the Interstate Commerce Act (49 USC 320(f), recodified as 49 USC 504(f)).

Id.

The proposed section was later included in the Department of Transportation's recommended legislative package, and considered by the House Committee on Public Works and Transportation following various hearings in 1985. Typical of the testimony was that given by Patrick H. Halstead, at the Field Hearings conducted before the Senate Subcommittee on Transportation of the Committee on Environment and Public Works on September 28, 1985 (S. Hrng. 99-270, Pt. 2) at pp. 215-16:

> This information is then used by the states to plan and program Section 203 Program improvements projects. Frequently such information, in the form of surveys and reports, has been used by attorneys representing plaintiffs in trials involving highway-railroad crossing accidents. As a result of this practice, states have understandably been reluctant to identify hazardous situations on a priority basis because of exposure to potential liability. Railroads, as well, have been cautious in supplying information to the states to be used in identifying hazardous crossings. These reports and surveys are developed in good faith to aid in the effectiveness of the Section 203 Program and should not be permitted to be used against states or railroads in personal injury or property damage litigation.

> Section 124. Prohibition Against Disclosure And Admission As Evidence of State Reports and Surveys. This section amends title 23 to provide that no report, survey, schedule, list, or data compiled for the purpose of complying with any requirement of sections 130, 144, and 152 of title 23, United States Code, or for developing any highway safety construction improvement project which may be implemented with Federal-Aid highway funds shall be required to be admitted into evidence or used in any action for damages arising from matters mentioned or addressed in such documents.

(Senate Report, at 27-28, 100th Cong., 1st Sess., *reprinted in* 1987 U.S. Code Cong. & Admin. News 66, at 91-92). In enacting 23 U.S.C. § 409, Congress acted to eliminate the fears of the states that the materials in their files (assembled for the purpose of surveying, prioritizing and planning projects so as to enhance the safety of grade crossings and other highway conditions) might be the basis for liability in damage lawsuits filed against them. Decisions such as the one by the court below frustrate the Congressional purpose.

The court in *Bearden v. Southern Railway*, CV88-PT-0005-S, slip op. (N.D. Ala. July 11, 1988) (memorandum opinion) (A-35) found that the purpose of Section 409 was to

> foster the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits. This court notes that the provision is broadly drawn to include locations *mentioned* in '. . . reports, surveys, schedules, lists or data.' . . . The government has a strong interest in obtaining information with regard to the safety of roadways and railroad-highway crossings free from the fear of future tort actions.

Slip op. at 3 (emphasis in original). A-36-37.

In sum, the purpose behind the enactment of 23 U.S.C. § 409 was to encourage full and frank disclosure of all relevant facts regarding a highway-railway grade crossing; to protect state employees from

disclosure of their identities and decision making processes which might make such employees subject to involvement in lawsuits; and to aid in providing a uniform plan for identifying, evaluating and planning the safety enhancement of potential accident sites, hazardous roadway conditions, and railway-highway grade crossings. These purposes have been defeated if the decision of the Alabama Supreme Court and other similar decisions by other courts are allowed to stand. Such decisions will discourage full disclosure, chill honest and robust analysis, and frustrate the federal plan for a uniform approach to the task of improving highway safety.

If documents subject to Section 409 can be discovered, the protection offered by the statute is eviscerated. That the documents may not be admitted into evidence is of no value. All a party has to do is get the documents, learn who said what when, and then depose the person and get them to say the same thing again. Such a reading negates the intent behind the statute.

Discovery of documents protected by Section 409 will, accordingly, subvert the federal program of encouraging full disclosure in an attempt to identify and correct existing hazardous roadway conditions. The stated Congressional purpose will be undermined. As a result of the lower court opinion, the law in Alabama presently does all of these things. This petitioner has no recourse to anyone other than this Court. The problem caused by the decision of the Alabama Supreme Court, and the problems caused by the decisions of other courts which have refused to recognize a privilege from discovery in Section 409, can only be corrected by this Court.

The importance of the question raised by this petition can scarcely be overstated. The decision of the Alabama Supreme Court and other similar decisions which have rejected the privilege of Section 409 threatens to expose state highway departments to liability, to involve them unnecessarily and wastefully in untold numbers of lawsuits (any document compiled by a state pursuant to 23 U.S.C. §§ 130, 144, or 152 is subject to discovery under these erroneous decisions), and to occupy an inordinate amount of time, energy and expense by highway department officials, which time, energy and expense could obviously

be better spent attempting to correct hazardous highway situations rather than responding to claims of liability and discovery. The importance of Section 409 warrants the attention of the Court to the question here presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Attorneys for Petitioner
State of Alabama Highway Department

APPENDIX

BEST AVAILABLE COPY

APPENDIX A

Ex parte STATE of Alabama
HIGHWAY DEPARTMENT.

(Re Shirley Ann BOONE, et al.

v.

SOUTHERN RAILWAY
COMPANY, et al.)

89-1101.

Supreme Court of Alabama.

Sept. 21, 1990.

Rehearing Denied Dec. 7, 1990.

Petition for Writ of Mandamus to the Jefferson Circuit Court, No. CV-88-7867.

Jack F. Norton, Chief Counsel, and Jerry L. Weidler and Janie Baker Clarke, for Alabama Highway Dept.

Leah O. Taylor of Taylor & Roberson, Birmingham, for respondent Shirley Ann Boone, et. al.

Crawford S. McGivaren, Jr. and Steve A. Tucker of Cabaniss, Johnston, Gardner, Dumas & O'Neal, Birmingham, for respondents Southern Ry. Co., Norfolk Southern Corp. and Alabama Great Southern R. Co.

PER CURIAM.

The petition for a writ of mandamus is denied on the condition that the production of the requested records be made *in camera*, so that the trial court can determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial.

WRIT DENIED.

HORNSBY, C.J., and JONES, ALMON, SHORES, ADAMS, and KENNEDY, JJ., concur.

MADDOX, HOUSTON and STEAGALL, JJ., dissent.

MADDOX, Justice (dissenting).

I would grant the writ in this case, because I do not believe that the records sought are properly discoverable.

The writ of mandamus sought by the State of Alabama Highway Department's petition should be issued, because 23 U.S.C. § 409 provides a privilege for the documents described in § 409 and that privilege is a complete bar to the admissibility or discovery of such documents. In addition, the purpose behind 23 U.S.C. § 409 requires the documents described in § 409 to be protected from disclosure. Section 409 prohibits both the admissibility and the discovery of all documents described in the statute. This conclusion is mandated by the language of the statute itself, by opinions interpreting the statute, and by a comparison with other similar statutes and decisions interpreting those statutes.

Although I recognize that material can be discovered if it will lead to the discovery of admissible evidence, it is clear that privileged information is not subject to discovery. Because I believe that the information sought to be discovered here is privileged, I would grant the Alabama Highway Department's petition for writ of mandamus; consequently, I must respectfully dissent.

HOUSTON and STEAGALL, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO.
CV 88-7867

SHIRLEY ANN BOONE, etc.,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY,
et al.,
Defendants.

CASE ACTION SUMMARY

3-30-90

Plaintiff's Motion to Compel directed to Alabama Highway Department is, after argument, and a determination by this Court for the second time, to construe the wording of 23 U.S.C. § 130, (specifically the phrase, ". . . or considered for any other purposes. . .") to mean a bar as to admissibility and/or consideration by any court, tribunal or body which is empowered to "consider" evidence and law, in arriving at a finding; however, it is the finding of this Court that the word "consider" as is employed in 23 U.S.C. § 130, does not contemplate or operate as a bar to, the discoverability only of materials the subject of said United States Code Section. Hence, Motion Granted and the Alabama Highway Department is given thirty (30) days to respond.

/s/William J. Wynn
Judge

APPENDIX C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 89-1101

Ex parte State of Alabama Highway Department

PETITION FOR WRIT OF MANDAMUS

(In re: Shirley Ann Boone, et. al. v. Southern Railway Company, et. al.)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/ record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing. Hornsby, CJ. Jones, Almon, Shores and Adams, JJ., concur; Maddox, Houston and Steagall, JJ., dissent.

Robert G. Esdale, Clerk
Supreme Court of Alabama

12/7/90
bsa

APPENDIX D

23 U.S.C. § 130. Railway-highway crossings

(a) Except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, except as provided in subsection (d) of section 120 of this title and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State highway department of the State in which the project is located,

in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects. Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices. At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment. Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that

total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report. Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway crossings program.

(h) Use of funds for matching. Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

23 U.S.C. § 144. Highway bridge replacement and rehabilitation program

(a) Congress hereby finds and declares it to be in the vital interest of the Nation that a highway bridge replacement and rehabilitation program be established to enable the several States to replace or rehabilitate highway bridges over waterways, other topographical barriers, other highways, or railroads when the States and the Secretary finds that a bridge is significantly important and is unsafe because of structural deficiencies, physical deterioration, or functional obsolescence.

(b) The Secretary, in consultation with the States, shall (1) inventory all those highway bridges on any Federal-aid system which are bridges over waterways, other topographical barriers, other highways, and railroads; (2) classify them according to serviceability, safety, and essentiality for public use; (3) based on that classification, assign each a priority for replacement or rehabilitation; and (4) determine the cost of replacing each such bridge with a comparable facility or of rehabilitating such bridge.

(c)(1)The Secretary, in consultation with the States, shall (1) inventory all those highway bridges on public roads, other than those on any Federal-aid system, which are bridges over waterways, other topographical barriers, other highways, and railroads, (2) classify them according to serviceability, safety, and essentiality for public use, (3) based on the classification, assign each a priority for replacement or rehabilitation and (4) determine the cost of replacing each such bridge with a comparable facility or of rehabilitating such bridge.

(2)The Secretary may, at the request of a State, inventory bridges, on and off the Federal-aid system, for historic significance.

(d) Whenever any State or States make application to the Secretary for assistance in replacing or rehabilitating a highway bridge which the priority system established under subsection (b) and (c) of this section shows to be eligible, the Secretary may approve Federal participation in replacing such bridge with a comparable

facility or in rehabilitating such bridge. The Secretary shall determine the eligibility of highway bridges for replacement or rehabilitation for each State based upon the unsafe highway bridges in such State. In approving projects under this section, the Secretary shall give consideration to those projects which will remove from service those highway bridges most in danger of failure.

(e) Funds authorized to carry out this section shall be apportioned among the several States on October 1 of the fiscal year for which authorized in accordance with this subsection. Each deficient bridge shall be placed into one of the following categories: (1) Federal-aid system bridges eligible for replacement, (2) Federal-aid system bridges eligible for rehabilitation, (3) off-system bridges eligible for replacement, and (4) off-system bridges eligible for rehabilitation. The square footage of deficient bridges in each category shall be multiplied by the respective unit price on a State-by-State basis, as determined by the Secretary; and the total cost in each State divided by the total cost of the deficient bridges in all States shall determine the apportionment factors. For purposes of the preceding sentence, the total cost of deficient bridges in a State and in all States shall be reduced by the total cost of any highway bridges constructed under subsection (m) in such State, relating to replacement of destroyed bridges and ferryboat services. No State shall receive more than 10 per centum or less than 0.25 per centum of the total apportionment for any one fiscal year. The Secretary shall make these determinations based upon the latest available data, which shall be updated annually. Funds apportioned under this section shall be available for expenditure for the same period as funds apportioned for projects on the Federal-aid primary system under this title. Any funds not obligated at the expiration of such period shall be reapportioned by the Secretary to the other States in accordance with this subsection.

(f) The Federal share payable on account of any highway bridge replaced or rehabilitated under this section shall be 80 per centum of the cost thereof.

(g) Set asides. (1) Discretionary bridge program. Of the amount authorized per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991 by section 106(a)(5) of the Federal-Aid Highway Act of 1987, all but $225,000,000 per fiscal year shall be apportioned as provided in subsection (e) of this section. $225,000,000 per fiscal year of the amount authorized for each of such fiscal years shall be available for obligation on the date of each such apportionment in the same manner and to the same extent as the sums apportioned on such date, except that the obligation of such $225,000,000 shall subject to section 149(d) of the Federal-Aid Highway Act of 1987, be at the discretion of the Secretary.

(2) Eligible discretionary projects. Subject to section 149(d) of the Federal-Aid Highway Act of 1987, amounts made available by paragraph (1) for obligation at the discretion of the Secretary may be obligated only —

(A) for a project for a highway bridge the replacement or rehabilitation cost of which is more than $10,000,000, and

(B) for a project for a highway bridge the replacement or rehabilitation cost of which is less than $10,000,000 if such cost is at least twice the amount apportioned to the State in which such bridge is located under subsection (e) for the fiscal year in which application is made for a grant for such bridge.

(3) Off-system bridges. Not less than 15 percent nor more than 35 percent of the amount apportioned to each State in each of fiscal years 1987, 1988, 1989, 1990, and 1991, shall be expended for projects to replace or rehabilitate highway bridges located on public roads, other than those on a Federal-aid system. The Secretary, after consultation with State and local officials, may, with respect to such State, reduce the requirement for expenditure for bridges not on a Federal-aid system when the Secretary determines that such State has inadequate needs to justify such expenditure.

(h) Notwithstanding any other provision of law, the General Bridge Act of 1946 (33 U.S.C. 525-533) shall apply to bridges authorized to be replaced, in whole or in part, by this section, except that subsection (b) of section 502 of such Act of 1946 and section 9 of the Act of March 3, 1899 (30 Stat. 1151) shall not apply to any bridge constructed, reconstructed, rehabilitated, or replaced with assistance under this title, if such bridge is over waters (1) which are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce, and (2) which are (a) not tidal, or (b) if tidal, used only by recreational boating, fishing, and other small vessels less than 21 feet in length.

(i) inventories and reports. The Secretary shall —

(1) report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives on projects approved under this section;

(2) annually revise the current inventories authorized by subsections (b) and (c) of this section;

(3) report to such committees on such inventories; and

(4) report to such committees such recommendations as the Secretary may have for improvements of the program authorized by this section.

Such reports shall be submitted to such committees biennially at the same time as the report required by section 307(e) of this title is submitted to Congress.

(j) Sums apportioned to a State under this section shall be made available for obligation throughout such State on a fair and equitable basis.

(k) Not later than six months after the date of enactment of this subsection, and periodically thereafter, the Secretary shall review the procedure used in approving or disapproving applications

submitted under this section to determine what changes, if any, may be made to expedite such procedure. Any such changes shall be implemented by the Secretary as soon as possible. Not later than nine months after the date of enactment of this subsection, the Secretary shall submit a report to Congress which describes such review and such changes, including any recommendations for legislative changes.

(l) Notwithstanding any other provision of law, any bridge which is owned and operated by any agency (1) which does not have taxing powers, (2) whose functions include operating a federally assisted public transit system subsidized by toll revenues, shall be eligible for assistance under this section but the amount of such assistance shall in no event exceed the cumulative amount which such agency has expended for capital and operating costs to subsidize such transit system. Before authorizing an expenditure of funds under this subsection, the Secretary shall determine that the applicant agency has insufficient reserves, surpluses, and projected revenues (over and above those required for bridge and transit capital and operating costs) to fund the necessary bridge replacement or rehabilitation project.

(m) Replacement of destroyed bridges and ferryboat service. (1) General rule. Notwithstanding any other provision of this section or of any other provision of law, a State may utilize any of the funds provided under this section to construct any bridge which—

(A) replaces any low water crossing (regardless of the length of such low water crossing),

(B) replaces any bridge which was destroyed prior to 1965,

(C) replaces any ferry which was in existence on January 1, 1984, or

(D) replaces any road bridges rendered obsolete as a result of United States Corps of Engineers flood control or channelization projects and not rebuilt with funds from the United States Corps of Engineers.

(2) Federal share. The Federal share payable on any bridge construction carried out under paragraph (1) shall be 80 percent of the cost of such construction.

(n) Off-system bridge program. Notwithstanding any other provision of law, with respect to any project not on a Federal-aid system for the replacement of a bridge or rehabilitation of a bridge which is wholly funded from State and local sources, is eligible for Federal funds under this section, is noncontroversial, is certified by the State to have been carried out in accordance with all standards applicable to such projects under this section, and is determined by the Secretary upon completion to be no longer a deficient bridge, any amount expended after the date of the enactment of this subsection from State and local sources for such project in excess of 20 percent of the cost of construction thereof may be credited to the non-Federal share of the cost of the projects in such State which are eligible for Federal funds under this section. Such crediting shall be in accordance with such procedures as the Secretary may establish.

(o) Historic bridge program. (1) Coordination. The Secretary shall, in cooperation with the States, implement the programs described in this section in a manner that encourages the inventory, retention, rehabilitation, adaptive reuse, and future study of historic bridges.

(2) State inventory. The Secretary shall require each State to complete an inventory of all bridges on and off the Federal-aid system to determine their historic significance.

(3) Eligibility. Reasonable costs associated with actions to preserve, or reduce the impact of a project under this chapter on, the historic integrity of historic bridges shall be eligible as reimbursable project costs under this title (including this section) if the load capacity and safety features of the bridge are adequate to serve the intended use for the life of the bridge; except that in the case of a bridge which is no longer used for motorized vehicular traffic, the costs eligible as reimbursable project costs

pursuant to this subsection shall not exceed the estimated cost of demolition of such bridge.

(4) Preservation. Any State which proposes to demolish a historic bridge for a replacement project with funds made available to carry out this section shall first make the bridge available for donation to a State, locality, or responsible private entity if such State, locality, or responsible entity enters into an agreement to

(A) maintain the bridge and the features that give it its historic significance; and

(B) assume all future legal and financial responsibility for the bridge, which may include an agreement to hold the State highway agency harmless in any liability action.

Costs incurred by the State to preserve the historic bridge, including funds made available to the State, locality, or private entity to enable it to accept the bridge, shall be eligible as reimbursable project costs under this chapter up to an amount not to exceed the cost of demolition. Any bridge preserved pursuant to this paragraph shall thereafter not be eligible for any other funds authorized pursuant to this title.

(5) Historic bridge defined. As used in this subsection, "historic bridge" means any bridge that is listed on, or eligible for listing on, the National Register of Historic Places.

(p) As sued in this section the term "rehabilitate" in any of its forms means major work necessary to restore the structural integrity of a bridge as well as work necessary to correct a major safety defect.

23 U.S.C. § 152. Hazard elimination program

(a) Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(b) The Secretary may approve as a project under this section any highway safety improvement project.

(c) Funds authorized to carry out this section shall be available for expenditure on any public road (other than a highway on the Interstate System).

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be apportioned to the States as provided in section 402(c) of this title. Such funds shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b)(1) except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by highway safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for highway safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement highway safety improvement projects for hazard elimination and the effectiveness of such improvements. Each

State report shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard eliminating program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvments required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

(As amended Apr. 2, 1987, P. L. 100-17 Title I, § 133(b)(12), 101 Stat. 172.)

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

Case No. CV-88-7867
Jefferson County
Circuit Court

Ex Parte STATE OF ALABAMA HIGHWAY DEPARTMENT
RE: Shirley Ann Boone, et al.,
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, et al.,
Defendants.

PETITION FOR WRIT OF MANDAMUS

(Filed: Apr. 27, 1990)

The STATE OF ALABAMA HIGHWAY DEPARTMENT ("PETITIONER") petitions the above-named Court for a writ of mandamus to Honorable William J. Wynn of the Circuit Court of Jefferson County and shows the following in support of this petition.

I

FACTS

The PETITIONER, which is not a party to the case, is the recipient of a civil subpoena for production of documents under Rule 34(b) (2) that was issued at the instance of the plaintiffs. The subpoena ordered PETITIONER to produce its entire file relating to the railroad crossing that is the location of the accident which is the subject of the action. (See copy of subpoena attached hereto as Exhibit 1.) The PETITIONER filed a response and objection the subpoena in which it asserted in part that the material designated in the subpoena is privileged pursuant to 23 U.S.C. §409. (See Response and Objection attached hereto as Exhibit 2.) Plaintiffs subsequently filed a Motion to Compel which was heard by the trial court on March 30, 1990. (See copy of Motion to Compel attached hereto as Exhibit 3.) The trial court granted

plaintiffs' motion and ordered the PETITIONER to produce the requested documents within 30 days. (See certified copy of Case Action Summary at page six attached hereto as Exhibit 4.)

The trial court ordered the PETITIONER to produce the documents designated in the subpoena to which PETITIONER had objected despite 23 U.S. C. §409, which reads as follows:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement projects which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.".

II

ISSUE PRESENTED

Whether 23 U.S.C. §409 bars discovery of documents including reports, surveys, schedules, lists or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings pursuant to 23 U.S.C. §§130, 144 and 152, for the purpose of developing any highway safety construction improvement project which may be implemented, utilizing Federal-aid highway funds.

III

RELIEF SOUGHT

The STATE OF ALABAMA HIGHWAY DEPARTMENT seeks a writ of mandamus compelling the Circuit Court of Jefferson County to enter an order that 23 U.S.C. §409 bars the discovery of the

documents designated in plaintiffs' subpoena to which it objected to producing.

IV

REASONS WHY THE WRIT SHOULD ISSUE

Production of the documents designated in plaintiffs' subpoena which PETITIONER objected to producing is barred by 23 U.S.C. §409. Matters concerning PETITIONER'S railway-highway crossing safety enhancement program are privileged by 23 U.S.C. § 409 and are not within the scope of Rule 26(b),A.R.Civ.P., because all railway-highway crossing safety improvement projects, including the Spruiell Street crossing in Leeds, are funded with federal-aid highway funds pursuant to 23 U.S.C. §130.

The trial court's Order compelling the production of documents relating to identifying, evaluating or planning the safety enhancement of a railway-highway crossing, for the purpose of developing a highway safety construction improvement project which may be implemented by utilizing Federal-aid highway funds, would have a deleterious effect on the PETITIONER'S rail-highway safety enhancement program. Producing the documents would handicap the employees of the of the PETITIONER who are charged with the responsibility for implementing safety measures that are vital for the safety of motorists. For its safety-enhancement program the PETITIONER depends on data furnished by its own employees and others. Producing this data in an action for damages may stop the flow of candid and accurate data upon which the PETITIONER's employees base their recommendations.

The following courts have held that 23 U.S.C. §409 bars the discovery of the same categories of documents for other railway-highway crossings that the PETITIONER has objected to producing in this case: United States District Court for the Northern District of Alabama, Circuit Court for Colbert County (per Judge Tompkins), Circuit Court for Lee County (per Judge Gulledge) and Circuit Court for Mobile County (per Judge Kendall).

V

PARTS OF RECORD ENCLOSED

Copies of the following parts of the record are enclosed:

1. Civil Subpoena for production of documents under Rule 34(b)(2);

2. Response and objection to subpoena filed by the PETITIONER;

3. Motion to compel filed by plaintiff; and

4. Page 6 of the Case Action Summary containing the Order dated March 30, 1990 compelling production.

WHEREFORE, the premises considered, PETITIONER prays that the Court grant the petition and order that an answer to the petition be filed by the respondents.

I certify that I have this 27th day of April, 1990, served copies of this petition on the respondent judge and all other parties to the action in the trial court.

/s/ JACK F. NORTON, Chief Counsel
Alabama Highway Department

/s/ JERRY L. WEIDLER, Counsel
Alabama Highway Department

/s/JANIE BAKER CLARKE, Counsel
Alabama Highway Department

Counsel for Petitioner

Address of Counsel:
Alabama Highway Department
1409 Coliseum Boulevard
Montgomery, AL 36130
Telephone (205) 242-6350

EXHIBIT 1

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO. CV-88-7867

SHIRLEY ANN BOONE, etc. et al.,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY et als,
Defendants.

CIVIL SUBPOENA FOR PRODUCTION OF DOCUMENTS UNDER RULE 34(b) (2)

(Filed: February 9, 1990)

TO: State of Alabama Highway Department
Attn: Mr. N. H. Cauthen
11 South Union Street
Montgomery, Alabama 36130

You are hereby commanded, at the instance of the Plaintiffs, within 15 days after service of this subpoena:

To produce and permit said party to inspect and to copy each of the following documents:

The entire file on the Spruiell Street (and/or Moss-Thornton) railroad crossing in Leeds, Jefferson County, Alabama, including but not limited to, any and all high accident location investigation forms, correspondence, inter-department memoranda, field notes, requests for programming, traffic counts, hazard indexes, priority listings, list of hazardous crossing sites, traffic engineering collision diagrams, diagnostic inspection team recommendations, plan or profile drawings, blueprints right-of-way maps, as-built drawings, construction plans, sight distances or sight-line measurements, engineering layouts, site plans, aerial photographs, drawings showing curvature of track, approach grades, reports, surveys, schedules, lists, or any other data or documents compiled by this department.

Dated January 23, 1990.

/s/ POLLY CONRADI,
CLERK

By:_____
Deputy Clerk

TED TAYLOR
P. O. Drawer H
Prattville, Alabama 36067
(205) 365-2221

By: LEAH O. TAYLOR
Attorneys for Plaintiffs

RETURN ON SERVICE

Received this Subpoena on _____ and served it on the within name _____ on _____.

_____
Process Server

EXHIBIT 2

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-88-7867

SHIRLEY ANN BOONE, etc. et al.,
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, et al.,
Defendants.

RESPONSE AND OBJECTION TO SUBPOENA

1. The State of Alabama Highway Department ("AHD"), which is the recipient of a subpoena for the production of documents, a copy of which is attached hereto as Exhibit 1, objects to producing the following documents described in the subpoena: high accident location investigation forms, correspondence, inter-department memoranda, field notes, requests for programming, hazard indexes, priority listings, list of hazardous crossing sites, traffic engineering collision diagrams, diagnostic inspection team recommendations, construction plans, sight distances or sight-line measurements, engineering layouts, site plans, and reports, surveys, schedules, lists or any other data or documents concerning the Spruiell Street railroad crossing compiled by the AHD.

This objection is based on the following grounds:

(a) The documents described above which plaintiff proposes to inspect and copy were prepared as part of the AHD's railway-highway safety enhancement program for the purpose of identifying, evaluating, or planning the safety enhancement of a railway-highway crossing for the purpose of complying with the provisions of 23 U.S.C. §130.

(b) Section 132 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, 23 U.S.C. §409, bars both the discovery and use at trial of "... reports, surveys, schedules, lists, or data compiled

for the purpose of identifying evaluating, or planning the safety enhancement of ... railway-highway crossings, pursuant to sections 130, 144, and 152 of this title ... in any action for damages arising from any occurrence at a location mentioned in such reports, surveys, schedules, lists, or data."

(c) Matters concerning the State of Alabama Highway Department's railway-highway crossing safety enhancement program are privileged by 23 U.S.C. §409 and are not within the scope of Rule 26(b), A.R.Civ.P.

2. The AHD does not have in its custody or possession as-built drawings, blueprints or drawings showing curvature of track and approach grades on the subject railroad.

3. The AHD will permit the inspection and copying of the following documents at its offices at 1409 Coliseum Boulevard, Montgomery, Alabama, at a time that is mutually agreeable to the parties to the action and to the undersigned counsel for the AHD: (1) traffic counts, (2) plan or profile drawings, and (3) right-of-way maps.

/s/ JERRY L. WEIDLER, Counsel
Alabama Highway Department

/s/ JACK F. NORTON, Chief Counsel
Alabama Highway Department

Address of Counsel:

Alabama Highway Department
1409 Coliseum Boulevard
Montgomery, AL 36130
Telephone: (205) 242-6350

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served on all counsel of record by first-class mail, postage prepaid, this 2nd day of March, 1990.

Ted Taylor, Esq.
P. O. Drawer H
Prattville, AL 36067

Leah F. Scalise, Esq.
Huie, Fernambucq & Stewart
Eighth Floor
First Alabama Bank Building
Birmingham, AL 35203

Crawford McGivaren, Esq.
Cabaniss, Johnston, Gardner, Dumas & O'Neal
1900 1st National
Southern Natural Building
Birmingham, AL 35203

/s/ Jerry L. Weidler

EXHIBIT 3

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO. CV-88-7867

SHIRLEY ANN BOONE, etc., et al,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, et als,
Defendants.

MOTION TO COMPEL

Come now the Plaintiffs in the above-styled cause, pursuant to Rule 37 (a) (2) of the Alabama Rules of Civil Procedure, and move this Court for an Order compelling the State of Alabama Highway Department, to produce the documents and other items as requested in Plaintiffs' Civil Subpoena for Production of Documents under Rule 34 (b) (2), filed on or about January 23, 1990. The requests in question and the Alabama Highway Department's responses are set out below:

Plaintiffs' request:

1. See attached Exhibit "A."

Alabama Highway Department's Response:

1. See attached Exhibit "B."

Original Signed by:
Leah O. Taylor, Attorney for Plaintiffs

OF COUNSEL

TAYLOR & ROBERSON
Attorneys at Law
P. O. Drawer H
Prattville, Alabama 36067
(205) 365-2221

LAW OFFICES OF JACK McNAMEE
2140 11th Avenue, South
Birmingham, Alabama 35203
(205) 933-1242

DATE OF HEARING

Please take notice that the date of the hearing on this Motion to Compel Request for Production is hereby set for Friday, March 30, 1990, at 10:00 o'clock a.m., before the Honorable William Wynn.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Hon. Steve A. Tucker and Hon. Crawford S. McGivern, 1900 First National-Southern Natural Building, Birmingham, Alabama, 35203; Hon. James Shaw and Hon. Leah Scalise, Eighth Floor, First Alabama Bank Building, Birmingham, Alabama, 35203; and Hon. Jerry L. Weidler, Alabama Highway Department, 1409 Coliseum Boulevard, Montgomery, Alabama, 36130, by placing a copy of same in the United States mail, postage prepaid and properly addressed on this the 16th day of March, 1990.

Original Signed by:
LEAH O. TAYLOR
Of Counsel

EXHIBIT "A"

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO. CV-88-7867

SHIRLEY ANN BOONE, etc. et al.,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, et als,
Defendants

CIVIL SUBPOENA FOR PRODUCTION OF DOCUMENTS UNDER RULE 34 (b) (2)

(Filed: February 9, 1990)

TO: State of Alabama Highway Department
Attn: Mr. N. H. Cauthen
11 South Union Street
Montgomery, Alabama 36130

You are hereby commanded, at the instance of the Plaintiffs, within 15 days after service of this subpoena:

To produce and permit said party to inspect and to copy each of the following documents:

The entire file on the Spruiell Street (and/or Moss-Thornton) railroad crossing in Leeds, Jefferson County, Alabama, including, but not limited to, any and all high accident location investigation forms, correspondence, inter-department memoranda, field notes, requests for programming, traffic counts, hazard indexes, priority listings, list of hazardous crossing sites, traffic engineering collision diagrams, diagnostic inspection team recommendations, plan or profile drawings, blueprints, right-of-way maps, as-built drawings, construction plans, sight distances or sight-line measurements, engineering layouts, site plans, aerial photographs, drawings showing curvature of track, approach grades, reports, surveys, schedules, lists, or any other data or documents compiled by this department.

Dated January 23, 1990

/s/ Polly Conradi,
CLERK

_____

By: Deputy Clerk

TED TAYLOR
P. O. Drawer H
Prattville, Alabama 36067
(205) 365-2221

Original Signed by:
LEAH O. TAYLOR
Attorneys for Plaintiffs

RETURN ON SERVICE

Received this Subpoena on _____ and served it on the within named _____ on _____.

Process Server

EXHIBIT "B"

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

Civil Action No. CV-88-7867

SHIRLEY ANN BOONE, etc. et al.,
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, et al.,
Defendants.

RESPONSE AND OBJECTION TO SUBPOENA

1. The State of Alabama Highway Department ("AHD"), which is the recipient of a subpoena for the production of documents, a copy of which is attached hereto as Exhibit 1, objects to producing the following documents described in the subpoena: high accident location investigation forms, correspondence, inter-department memoranda, field notes, requests for programming, hazard indexes, priority listings, list of hazardous crossing sites, traffic engineering collision diagrams, diagnostic inspection team recommendations, construction plans, sight distances or sight-line measurements, engineering layouts, site plans, and reports, surveys, schedules, lists or any other data or documents concerning the Spruiell Street railroad crossing compiled by the AHD.

This objection is based on the following grounds:

(a) The documents described above which plaintiff proposes to inspect and copy were prepared as part of the AHD's railway-highway safety enhancement program for the purpose of identifying, evaluating, or planning the safety enhancement of a railway-highway crossing for the purpose of complying with the provisions of 23 U.S.C. §130.

(b) Section 132 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, 23 U.S.C. §409, bars both the discovery and use at trial of " ... reports, surveys, schedules, lists, or data

compiled for the purpose of identifying evaluating, or planning the safety enhancement of ... railway-highway crossings, pursuant to sections 130, 144, and 152 of this title ... in any action for damages arising from any occurrence at a location mentioned in such reports, surveys, schedules, lists, or data."

(c) Matters concerning the State of Alabama Highway Department's railway-highway crossing safety enhancement program are privileged by 23 U.S.C. §409 and are not within the scope of Rule 26(b), A.R.Civ.P.

2. The AHD does not have in its custody or possession as-built drawings, blueprints or drawings showing curvature of track and approach grades on the subject railroad.

3. The AHD will permit the inspection and copying of the following documents at its offices at 1409 Coliseum Boulevard, Montgomery, Alabama, at a time that is mutually agreeable to the parties to the action and to the undersigned counsel for the AHD: (1) traffic counts, (2) plan or profile drawings, and (3) right-of-way maps.

/s/ Jerry L. Weidler, Counsel
Alabama Highway Department

Jack F. Norton, Chief Counsel
Alabama Highway Department

Address of Counsel:

Alabama Highway Department
1409 Coliseum Boulevard
Montgomery, AL 36130
Telephone: (205) 242-6350

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served on all counsel of record by first-class mail, postage prepaid, this 2nd day of March, 1990.

Ted Taylor, Esq.
P. O. Drawer H
Prattville, AL 36067

Leah F. Scalise, Esq.
Huie, Fernambucq & Stewart
Eighth Floor
First Alabama Bank Building
Birmingham, AL 35203

Crawford McGivaren, Esq.
Cabaniss, Johnston, Gardner, Dumas & O'Neal
1900 1st National
Southern Natural Building
Birmingham, AL 35203

/s/ Jerry L. Weidler

EXHIBIT 4

CASE ACTION SUMMARY
CONTINUATION

Case No. CV-88-7867

ACTIONS, JUDGMENTS, CASE NOTES

2/7/90	COL supplemental intgs and 2nd req for prod to pltf
2/20/90	Not of depo of WLB, RC, JC, TJ, IEM, WCM
12/11/89	TAGSRC, NSR, SRC supplemental resp to intgs
12/12/89	Not of depo of LAM, KE, Chief B, CT, JC
12/14/89	TAGSRC, NSR, SRC, resp to 2nd req for prod
3/5/90	So AHD resp and obj to subpoena
3/19/90	Illegible
3/30/90	Plaintiff's Motion To Compel directed to Alabama Highway Department is, after argument, and a determination by this Court for the second time, to construe the wording of 23 U.S.C. §130, (specifically the phrase, "... or considered for any other purposes ...") to mean a bar as to admissibility and/or consideration by any court, tribunal or body which is empowered to "consider" as is employed in 23 U.S.C. §130, does not contemplate or operate as a bar to, the discoverability only of materials the subject of said United States Code Section. Hence, Motion Granted and the Alabama Highway Department is given thirty (30) days to respond

/s/ Illegible
Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV88-PT-0005-S

LORENE BEARDEN
Plaintiff,

V.

SOUTHERN RAILWAY COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed: July 11, 1988)

This cause comes to be heard on plaintiff's Objection to the Magistrate's ruling pursuant to Rule 72(a) F.R.Civ.P. on April 28, 1988. Magistrate Paul W. Greene granted defendant's Motion to Quash a subpoena issued to Mr. Cecil W. Colson, Jr., an Accident Identification and Surveillance Engineer employed by the Alabama Highway Department. Magistrate Greene also entered a protective order on that same day to the effect that Mr. Colson is not required to testify with regard to the contents of the Department's files relative to the intersection of Shelby County Highway 17 and the Southern Railway track.

Under Rule 72(a), this court is to review the order of the Magistrate and modify it or set it aside if it is found to be "clearly erroneous or contrary to law."

The basis of the Magistrate's order quashing the subpoena and imposing the protective order is 23 U.S.C. § 130 et. seq. as amended P. L. 100-17(a) § 409. The provision states:

Admission as Evidence of Certain Reports and Surveys

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or *data compiled for the purpose of identifying,*

> *evaluating or planning* the safety enhancement of potential accident sites, hazardous roadway conditions or railroad-highway crossings, pursuant to § § 130, 144, and 154 of this Title or for the purpose of developing any highway safety construction improvement project which may be implemented using Federal Aid to Highways Funds shall not be admitted into evidence in federal or state courts *or considered for other purposes* in any action for damages arising from any occurrences at a location mentioned or addressed in such reports, surveys, schedules, lists or data" (emphasis added).

Plaintiff's subpoena sought the production of: (i) the result of any previous accident investigations conducted relative to the Highway 17/Southern R.R. crossing, (ii) the hazard index for the crossing in the years 1980-1988 (iii) all correspondence relating to the crossing (particularly between the highway department and the defendant railroad) and (iv) "all reports surveys and other material" concerning the crossing in the possession of the Alabama Highway Department.

Per agreement of the parties, Magistrate Greene conducted an *in camera* examination of the material sought for the year November 1986-November 1987. Magistrate Greene concluded that "any attempt to remove or redact the pertinent material in an attempt to permit some discovery would render the material incomprehensible, even if such an attempt were permitted under the statute (Order, dated April 28, 1988 at 4).

The plain language of § 409 precludes data related to railroad-highway crossings from being admitted or considered for other purposes. The conclusion that the phrase "for other purposes" includes discovery is a logical one. Both parties apparently agree that the provision applies both to discovery and admission at trial.

The apparent purpose of this provision is to foster the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information

would be discoverable and admissible in civil suits.[1] This court notes that the provision is broadly drawn to include locations *mentioned* in " ... reports, surveys, schedules, lists or data."

Association of Women in Science v. *Califano*, 566 F.2d 339 (D.C. Cir. 1977) directs that where the confidentiality of reports is mandated by proper authority, the court must balance the need of the litigants for the information possessed by the government with the government's interest in fostering the free flow of information. Magistrate Greene's decision with respect to this balance is well supported. The government has a strong interest in obtaining information with regard to the safety of roadways and railroad-highway crossings free from the fear of future tort actions.

Plaintiff argues on brief that (i) the information contained in the reports is crucial to its case and (ii) that it cannot obtain the information from any other source. Even if both these propositions were true, it would still not overcome the strong government in having roadway enhancement reports made free from the fear of litigation.[2]

Moreover, this court remains unconvinced that the information plaintiff seeks regarding the safety of the highway 17 crossing is not obtainable elsewhere.

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[1] Plaintiff apparently believes that the purpose of § 409 was to confer some immunity on State High Engineers (plaintiffs brief at 2). This court cannot agree in view of the fact that the provision precludes the use of such data in "any action," not simply those brought against state or local authorities. This suggests that the coverage of the provision is very broad.

[2] The plaintiffs in *Association for Women in Science* made essentially the same argument that plaintiffs do here, the court commented in response:

> The hardship to individual litigants which results from the assertion of privilege in these instances is, in our view, outweighed by "an interest legislatively or judicially deemed more more important to society as a whole."

(Citation ommitted).

Plaintiff's objection is OVERRULED.

DONE and ORDERED this 11th day of July, 1988

/s/ ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:89CV0531

TIME STUDY CASE

KATHLEEN K. NEELY,
Individually and as Administratrix of the
Estate of Jerry M. Neely, deceased,
Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION, aka CONRAIL,
Defendant.

ORDER

I. INTRODUCTION.

Before the Court is a motion by plaintiff to compel discovery pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure (Docket #29). Plaintiff's affidavit indicates compliance with Local Rule 3.04's requirement that a sincere attempt be made by the parties to resolve discovery disputes before turning to the Court. Plaintiff's motion to compel indicates that defendant has failed to either respond or object to plaintiff's first and second set of interrogatories and has objected to and refused to answer plaintiff's request for production of documents nos. 2, 3, 4, 5, 21 and 22.

Defendant has opposed plaintiff's motion to compel (docket #35). In its opposition, defendant indicates that it answered plaintiff's first and second set of interrogatories on November 2, 1989, the same day as plaintiff's amended motion to compel was filed with this Court. Presumably, this moots that portion of plaintiff's motion to compel. However, defendant continues to oppose the production of the above-enumerated documents on two grounds. First, defendant contends

plaintiff's stated claim that Conrail negligently failed to install a gate at the crossing at issue is preempted by federal law.[1] Accordingly, it is defendant's position that these documents are not likely to lead to the discovery of admissible evidence since this discovery is directed at plaintiff's allegation of negligence with respect to failure to install a gate. Second, defendant contends that plaintiff's requests are specifically prohibited by 23 U.S.C. § 409.

Also before the Court is a motion by defendant for a protective order (docket #38) and a motion *in limine* (docket #26). In its motion for a protective order defendant seeks to bar plaintiff's discovery of documents sought by plaintiff's request for production of documents nos. 2, 3, 4, 5, 21 and 22. In its motion *in limine*, defendant moves the Court for an order instructing plaintiffs and all witnesses to refrain from introducing evidence at trial concerned with any alleged failure on Conrail's part of provide adequate warning devices at the crossing where plaintiff's decedent was killed. The underlying basis for both of defendant's motions is two-fold. First, defendant contends that Congress has preempted state law with respect to railroad safety,[2] thus prohibiting plaintiff from recovering on the state law cause of action as well as rendering discovery and the introduction of evidence on that issue irrelevant. Second, defendant argues that since the documents at issue were prepared for the purpose of evaluating the need for additional protection at the Waterloo Road crossing, they are protected from discovery by 23 U.S.C. § 409. Plaintiff has opposed defendant's motion for a protective order (docket #42), however has not yet responded to defendant's motion in limine.

Defendant has also filed a motion for summary judgment to which plaintiff has responded. However, plaintiff has indicated that she may move to supplement her response if the Court should grant her motion to compel and the compelled discovery provides information that

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[1] The Court observes that defendant's preemption argument is properly the subject of a dispositive motion, not a discovery motion or motion in limine.

[2] *See* footnote 1, *supra*.

would lend additional support to her opposition to defendant's motion for summary judgment.

II. LAW & DISCUSSION.

Defendant argues that federal legislation prohibits plaintiff's requested discovery of the documents at issue.

> § 409. *Admission as evidence of certain reports and surveys.*
>
> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

23 U.S.C. §409.

The Court observes that there is no legislative history on § 409, nor are there any published cases which speak to the interpretation of the statute. Absent guidance from Congress or the published opinions of other courts, this Court will be guided by the plain language of the statute.[3]

---

[3] Defendant cites the Court to two unpublished cases which it argues support its position that § 409 prohibits discovery by plaintiff of the documents at issue. In *Bearden v. Southern Railway*, (N.D. Ala. July 11, 1988), No. CV 88-PT-0005-S, plaintiff Lorene Bearden brought an action against Southern Railway Co., Inc., as the administratrix of the estate of Calvin Bearden. Plaintiff issued a subpoena to Cecil Colson, an Accident Identification and Surveillance Engineer employed by the State of Alabama Highway Department, ordering him to produce documents relating to the railroad crossing issue. The documents sought included the result of any previous

(Footnote 3 continued on next page)

The express language of the statute deals with the admission of certain materials into evidence. While the statute does not expressly prohibit discovery, the language of the statute broadly provides that information compiled for the purposes designed by the statute shall not be admitted into evidence "or considered for other purposes in any action for damages" arising out of an occurrence at a location "men-

---

(Footnote 3 continued)

accident investigations conducted relative to the subject crossing, the "hazard index" for the crossing for the years 1980-1988, any correspondence relating to the crossing between the Highway Department and the defendant railroad, and the production of all reports, surveys, and other materials concerning the crossing that might be in possession of the Alabama Highway Department. Counsel for Mr. Colson and the Alabama State Highway Department sought to have the subpoena quashed and a protective order on the basis of 23 U.S.C. § 409. Mr. Colson provided an affidavit that stated the documents sought were prepared for the purpose of complying with a program to eliminate hazards at railway-highway crossings in Alabama.

After conducting an *in camera* review of the documents in question, Magistrate Green granted defendant's motion to quash the subpoena to Mr. Colson for documents in his files as well as defendant's motion for a protective order to the extent Mr. Colson is not obligated to testify with regard to the contents of the files relative to the intersection that was at issue. The district court overruled plaintiff's objections to the Magistrate's Order. In overruling plaintiff's objections, the district court observed that "[t]he apparent purpose of [§ 409] is to foster the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits." *Id.* at p. 4 [footnote omitted]. In overruling plaintiff's objection to the Magistrate's Order, the district court was not swayed by plaintiff's argument that the information contained in the reports was crucial to her case or that the information could be obtained from any other source.

In *Singer v. Southern Railway Co.* (Superior Ct. N. Car. November 10, 1988), 88 CVS 3898, plaintiff sought to discover the methods and procedures by which the Southern Railway Company assesses the safety of railroad crossings, including correspondence regarding the safety of railroad crossings and programs designed to upgrade the safety of unsafe crossings. In response, the Southern Railway Company sought a protective order prohibiting discovery that related to the safety enhancement of any railway-highway crossing either before or after the October 30, 1987, collision that was the subject of that action. The Superior Court Judge in Singer granted defendant's motion for a protective order after conducting an *in camera* inspection of the documents at issue and determining that the documents produced were not subject to discovery.

tioned" in any kind of report, survey, etc., compiled for the purposes designated by the statute. The language of the statute is easily broad enough to encompass a prohibition on discovery. Further, the statute on its face applies to any reports, surveys, etc., compiled for the purpose identified by the statute without regard to the preparing entity. Accordingly, the statute, on its face, may be read to prohibit the discovery of materials prepared by the defendant Conrail for the purposes designated by that section.

The Court observes that limitations on discovery are contrary to the general rule that discovery rules are to be broadly construed so as to promote mutual knowledge of all relevant facts. Accordingly, the limitations on discovery imposed by § 409 shall be strictly construed by this Court. The Court notes that materials prepared for purposes detailed in § 409 may also contain information extraneous to those precise purposes. A defendant may not avoid discovery by including in a report prepared under the guise of § 409 information unnecessary to accomplish the purposes defined by the statute.

Plaintiff alleges that with respect to the operation of its train, defendant was negligent in failing to keep a proper lookout, failure to yield the right of way, operating at an excessive rate of speed, and failing to warn motorists of its approach. With respect to the maintenance of the railroad crossing in question, plaintiff alleges that defendant was negligent in failing to properly maintain the track circuit, failing to supply the railroad crossing with gates, failing to have a properly working signal and an aligned signal, and failing to supply the railroad crossing with the proper warnings. Generally, plaintiff alleges that "defendant was negligent in other respects to be shown at the time of trial, both with respect to its ownership, operation and maintenance of the train and the railroad crossing in question." Plaintiff's Complaint, ¶ 9.

Hypothetically and by way of example, if there was information contained in a document allegedly prepared by Conrail for the purposes detailed in § 409 which suggested that the driver of the train was intoxicated at the time of the accident at issue, this information would be discoverable if that information was not necessary for the purpose

of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings since it would be relevant to certain allegations of negligence by plaintiff.

The next question that arises is whether Conrail may invoke the protection of the statute with respect to materials prepared by the defendant *before* the effective date of the statute. 23 U.S.C. § 409 was enacted on April 2, 1987. The accident that is the subject of the instant action occurred on July 19, 1988, and the instant action was commenced on March 24, 1989. The general rule is that a court applies the law that is in effect at the time it renders its decision unless to do so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Marx v. Centran Corp.*, 747 F.2d 1536, 1542 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985) (citing *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711 (1974)). The Court is not aware of any statutory direction or legislative history on this matter.

Manifest injustice is likely to be found where the application of an intervening change to a *pending* action would infringe upon or deprive a person of a right that had matured or become unconditional. *Bradley v. School Board of City of Richmond*, 416 U.S. at 720. While procedural changes in legislation are to be applied to pending actions absent contrary indications by Congress and procedural prejudice to either party, what constitutes "procedural prejudice" is construed more narrowly that what constitutes "manifest injustice" vis-a-vis substantive rights. *Greer v. Skillcraft*, 704 F. Supp. 1570, 1574 (N.D. Ala. 1989) (citing *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563 (1967)). Noting the distinction between substantive and procedural legislation, at least one circuit has held that "new statutes that affect antecedent rights will not apply retroactively while those that affect only procedure or remedy will apply retroactively." *Greer v. Skillcraft*, 704 F. Supp. at 1574 (quoting *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (citations omitted)).

The Court observes that the facts and circumstances of this case arose *after* the enactment of § 409. Additionally, evidentiary and discovery rules are normally considered procedural rather than substantive. Further, the Court finds that applying § 409 to the discovery in the instant case does not work a manifest injustice by depriving plaintiff of any substantive right she may have, nor does it work a procedural prejudice on the plaintiff in that application of § 409 forecloses plaintiff from only one avenue of discovery. Taking all these factors into consideration, the Court finds that § 409 applies to the discovery efforts of the instant litigation with respect to materials generated by Conrail before the enactment of the statute, as well as after.

While the Court finds that 23 U.S.C. § 409 is applicable to discovery in this case, the Court has the obligation to review the documents in issue to determine if they actually fall within the purview of § 409's prohibitions in whole or in part. Accordingly, the defendant shall make the documents at issue, together with an index, available to the Court for an *in camera* review.[4] Present at the *in camera* review shall be an appropriate representative of Conrail able to authenticate the documents and their contents and provide the Court with information as to the purpose for which the documents were prepared. The *in camera* review of these documents shall be held on January 30, 1990, at 9:00 a.m. After conducting the *in camera* review, the Court will issue its ruling on plaintiff's motion to compel and defendant's motion for a protective order.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U. S. District Judge

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[4] It is recommended that to facilitate the Court's review of these documents, they be numbered according to the Bates method and the index referenced accordingly.

APPENDIX H

IN THE CIRCUIT COURT OF
COLBERT COUNTY, ALABAMA

CASE NUMBER CV 86-230
CASE NUMBER CV 86-350

STATE OF ALABAMA
COLBERT COUNTY
SHIRLEY NELSON, et al.,
PLAINTIFF

VS.

SOUTHERN RAILWAY COMPANY, et al.,
DEFENDANT

AND

TOMMY WOODS, et al.,
PLAINTIFFS

VS.

SOUTHERN RAILWAY COMPANY, et al.,
DEFENDANTS

ORDER

This cause coming before the Court on the Objection to Proposed Inspection and Copying of Designated Materials and Motion to Quash Subpoena for and on behalf od[sic] Billy Joe DeRamus and R. Don. Vawter this the 26th day of January, 1988 and with the attorneys, Jerry L. Weidler, David Howard and William Hovater being present and representing the respective parties, and with arguments be made to the Court and the Court considering the same the Court makes the following findings:

1. The Court finds that Section 132 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, PUB. L. 100-17, 101 Stat. 132, states as follows: "Not withstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose

of identifying, evaluating or planning the safety enhancement of potential accident cites, hazardous roadway conditions, or railway-highway crossings, pursuant to Section 130, 144 and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data."

2. The Court further finds that the statute stated above was in effect at the time discovery motions were made by the Plaintiff.

3. The Court further finds that Rule 26 of ARCP concerning discovery are superceded[sic] by the statutes stated above.

The Court considering these findings and other arguments made to the Court, and in relying on Section 132 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, the Court does grant the objection to proposed inspection and copying of designated materials, and further orders that the subpoena is quashed as to Billy Joe DeRamus and R. Don Vawter as to the scope of oral examination which shall be limited to exclude matters concerning the diagram review of railway crossings 731-957K or the content of documents or data maintained by the Alabama Highway Department which pertain to railroad crossing 731-947K.

Done and ORDERED this the 27th day of January, 1988.

/s/ Illegible
Circuit Judge

cc: Jerry Weidler
William Hovater
David Howard

APPENDIX I

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA
GUILFORD COUNTY

88CVS 3898

LINDA C. SINGER, Administratrix of the Estate of
Charles Franklin Singer, Deceased,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY,
BRALLEY-WILLETT TANK LINES, INC.
and ANTHONY C. CRANFORD,
Defendants.

PROTECTIVE ORDER

THIS CAUSE COMING ON TO BE HEARD and being heard before the Honorable James A. Beatty, Jr., Superior Court Judge presiding at the November 7, 1988 session of the General Court of Justice, Superior Court Division, upon the motion to compel discovery filed by plaintiff Linda C. Singer and the motion for protective order filed by defendant Southern Railway Company; and

IT APPEARING TO THE COURT that the basis of the Southern Railway Company objections to certain interrogatories and to the production of certain documents and the basis of the Southern Railway Company motion for protective order is that 23 U.S.C. § 409 protects the contents of certain files from discovery; and

IT APPEARING TO THE COURT that the purpose of 23 U.S.C. § 409 is to foster the free flow of safety-related information which will or may lead to the safety enhancement of railroad-highway crossings by protecting that information from discovery or admission at trial without the express consent of the railroad; and

IT APPEARING TO THE COURT that 23 U.S.C. § 409 is not unconstitutional and that any hardship which 23 U.S.C. § 409 may cause individual litigants is outweighed by the public interest in fostering this free flow of information; and

IT APPEARING TO THE COURT that these motions were previously considered by the Honorable James N. Long at the October 3, 1988 session of the General Court of Justice, Superior Court division; and

IT APPEARING TO THE COURT that on October 12, 1988 the Honorable James M. Long, Superior Court Judge, entered an order which, among other things, directed Southern Railway Company to produce certain files, an index and one or more witnesses familiar with those files to aid this Court in determining whether the data in those files is subject to discovery or exempt from discovery pursuant to 23 U.S.C. § 409; and

IT APPEARING TO THE COURT that at the November 7, 1988 session Southern Railway Company complied with the October 12, 1988 order and produced the requested files, the index and two witnesses, one of whom was Donald W. Dodson, Administrator of Highway Grade Grossing Programs, a person familiar with the files; and

IT APPEARING TO THE COURT, from the testimony of Donald W. Dodson at the November 7, 1988 session and from the Court's subsequent *in camera* inspection of the documents in the files presented to the Court, that the data in those files is not subject to discovery; and

IT APPEARING TO THE COURT that the parties stipulated and agreed in open court during the hearing that this order could be signed and entered out of session; and

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The documents in the files which defendant Southern Railway Company produced for *in camera* inspection are not discoverable;

2. Plaintiff's motion to compel is denied; and

3. The motion for protective order filed by Defendant Southern Railway Company is allowed, except that plaintiffs may take discovery depositions of the specified officers and employees of defendant Southern Railway Company in the counties wherein they reside or are employed or transact their business in person, but such officers and employees are not obligated to testify with regard to the contents of the aforementioned files inspected *in camera* by this Court.

This the 30 day of November, 1988

/s/ James A. Beatty, Jr.
Superior Court Judge

APPENDIX J

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NORTH CAROLINA
GUILFORD COUNTY

87 CVS 8959
88 CVS 3898

Southern Railway Company,
Plaintiff,

v.

Bralley-Willett Tank Lines, Inc. and
Anthony C. Cranford,
Defendants.

* *

Linda C. Singer, Administratrix
of the Estate of Charles Franklin Singer, Deceased,
Plaintiff,

v.

Southern Railway Company,
Bralley-Willett Tank Lines, Inc.
and Anthony C. Cranford,
Defendants.

ORDER

This matter coming on to be heard and being heard before the undersigned Judge of Superior Court at the February 20, 1989 Civil Session in Greensboro, Guilford County, North Carolina, and having considered the evidence placed before the court, matters of record and arguments of counsel, the Court enters its findings and decisions on the motions of the parties to this action as follows:

1. With respect to Southern Railway Company's Motion for Partial Summary Judgment on the Counterclaims and Crossclaims of Bralley-Willett Tank Lines, Inc. for property damage and Anthony C. Cranford

for personal injury, the Court, having considered the pleadings, answers to interrogatories, and admissions, together with affidavits and other documents, finds that there is no genuine issue as to any fact material to those defendants counterclaims and crossclaims, and that Southern Railway Company is entitled to summary judgment as a matter of law.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that Southern Railway Company's motion for partial summary judgment on the counterclaims and crossclaims of Bralley-Willett Tank Lines, Inc. for property damage and Anthony C. Cranford for personal injury are ALLOWED. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

2. With respect to Southern Railway Company's claims against the defendants Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford, the Court on its own motion, and after considering the pleadings, answers to interrogatories, and admissions, together with the affidavits and other documents, finds that with respect to such claims there is no genuine issue of material fact, and that Southern Railway is entitled to summary judgment as to liability as a matter of law.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that Southern Railway Company is entitled to summary judgment with respect to all claims made against the defendants Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford, except as to the amount of damages to be determined, and the Court's motion is ALLOWED. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

3. With respect to Southern Railway Company's Motion in Limine, the Court, having considered the pleadings, answers to interrogatories, arguments of counsel, and other matters properly placed before the Court, finds that the mentioning, directing or inducing such mention, or introducing other evidence concerning any alleged failure by Southern Railway to provide adequate warning devices at the Chimney Rock Road railroad crossing and, in particular, concerning

the presence or absence of automatic gates at the crossing both at the time of the collision between the tractor-tanker driven by defendant Anthony C. Cranford and Southern Railway Train No. 75 on October 30, 1987, and subsequent to that time is inadmissible in light of 23 U.S.C. §409, the Federal Railroad Safety Act, 45 U.S.C. §421 *et seq.* and the Highway Safety Act, 23 U.S.C. §401 *et seq.*, and under Rule 402 and other considerations.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the motion is ALLOWED, and opposing counsel are instructed, and are directed to instruct all witnesses called and examined by them, to refrain from mentioning, directing or inducing, or introducing other evidence concerning any alleged failure by Southern Railway to provide adequate warning devices at the Chimney Rock Road railroad crossing, and in particular, concerning the presence or absence of automatic gates at the crossing, both at the time of the collision between the tractor-tanker driven by defendant Anthony C. Cranford and Southern Railway Train No. 75 on October 30, 1987, and subsequent to that time. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

4. With respect to Bralley-Willett Tank Lines, Inc.'s and Anthony C. Cranford's Motion In Limine To Allow the Introduction of Documents Presently Under Judge Beaty's[sic] Protective Order, the Court having considered the pleadings, answers to interrogatories, and arguments of counsel, and other matters properly placed before the Court, finds that such documents and all similar documents, including those in the possession or files of the North Carolina Department of Transportation, are protected from admission into evidence as well as discovery by 23 U.S.C. §409, and that the disclosure or admission into evidence of such documents would constitute a violation of federal law, and that such federal law preempts the state common law allowing discovery and/or admission of such information.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the motion is DENIED and counsel for Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford shall not be entitled

to production and inspection of the documents presently under Judge Beaty's[sic] protective order, or similar documents including those in the possession or files of the North Carolina Department of Transportation, and such documents shall not be considered for admission into evidence in this action. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

5. With respect to the defendants Bralley-Willett Tank Lines, Inc.'s and Anthony C. Cranford's Motion In Limine To Exclude Testimony of Dr. Rex Nicholson [sic] and Mr. Gary Wolf, the Court having found that such motion is grounded upon such persons' unavailability for deposition testimony, and that such unavailability was not caused by or attributable to Southern Railway Company, and that the Court shall allow deposition testimony of such persons prior to their testimony in this action without unfairly prejudicing any party to this action.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the motion is DENIED; provided, however, that at least 24 hours prior to seeking testimony from the witness stand for either Dr. Rex Nicholson [sic] or Mr. Gary Wolf, Southern Railway Company shall make available such persons for deposition testimony by any other party to this action.

6. With respect to Bralley-Willett Tank Lines, Inc.'s and Anthony C. Cranford's Motion to Limit Damages, the Court having found that such motion is based upon and requires statutory construction of North Carolina General Statute § 1B-1(i), and having heard the arguments of counsel, the Court finds that the word "sought" as set forth in G.S. § 1B-1(i)(3) refers to an attempt to impose liability through presentation of evidence at trial, and that the plaintiff Linda C. Singer has filed her Voluntary Dismissal of all claims against Southern Railway Company, and that liability against "both a common carrier by rail and any other person or persons" is not therefore "sought to be imposed" by the plaintiff Linda C. Singer.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the motion is DENIED. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

7. With respect to Bralley-Willett Tank Lines, Inc.'s and Anthony C. Cranford's Motion to Strike Punitive Damage Claims based on Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and on federal and state constitutional grounds, the Court, after hearing arguments of counsel, finds and hereby orders that the motion should be and is DENIED. The exceptions of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford to this order are noted.

8. With respect to Bralley-Willett Tank Lines, Inc.'s and Anthony C. Cranford's Motion In Limine To Bar Reference to "I'm going to beat the train", the Court, having heard the arguments of counsel, and having considered the pleadings, answers to interrogatories, and other matters properly placed before the Court, finds that the court cannot determine at this time the propriety of allowing such statements to be admitted through Mr. William Shown, and that unfair prejudice could result to the defendants through references to such statement prior to the introduction of such statement into evidence through Mr. William Shown.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that no reference to statements similar to "I'm going to beat the train" shall be allowed by counsel or any witness prior to the Court's further ruling on the propriety of such evidence.

9. With respect to Southern Railway Company's Renewed Motion to Sever, the Court, having heard the arguments of counsel and considered other matters properly placed before the Court, finds that severance of these actions is not appropriate.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that the motion is DENIED. The exception of Southern Railway Company to this order is duly noted and entered.

10. The Motion of Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford for the admission of William J. McDaniel *pro hac vice* is ALLOWED.

11. With respect to the Motion of Linda C. Singer to reapportion peremptory jury challenges, the Court, having heard the arguments of

counsel and considered other matters properly placed before it, finds that the proposed re-apportionment is inappropriate.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED AND DECREED that Bralley-Willett Tank Lines, Inc. and Anthony C. Cranford together shall have eight peremptory challenges, Southern Railway Company shall have eight peremptory challenges, and Linda Singer shall have eight peremptory challenges.

This the 21 day of February, 1989.

/s/ Honorable Robert H. Hobgood
Superior Court Judge Presiding

APPENDIX K

MEMORANDUM

U.S. Department of Transportation
Federal Highway Commission

Subject: Proposed Amendment to Highway Safety Legislation

Date: May 4, 1983

From: Associate Administrator for Safety, Traffic Engineering, and Motor Carriers

Reply to
Attn. of : HSA-1.1

To: Mr. D. L. Ivers
Chief Counsel

HCC-1

For the past several years, we have attempted to include in the Department's legislative program a provision to protect from disclosure information compiled by States to identify and prioritize roadway hazards. It has been consistently brought to our attention that highway departments are reluctant to undertake such efforts (as required in 23 USC 152, for instance) for fear that acknowledging the existence of hazardous conditions would expose them to liability. The issue has once more been raised, this time by the American Association of Railroads, in connection with requirements placed on them by States in identifying hazardous rail-highway crossings pursuant to Sec. 203(a) of the Highway Safety Act of 1973.

It is noted that our suggestion was included in DOT's Legislative Program for the 97th Congress, 2nd Session, in the second category. We also note that highway safety legislation is being introduced in this legislative session. In the event such safety legislation receives serious consideration, it is recommended that an amendment be included to protect information compiled for purposes of safety enhancement. The following language is suggested:

"Notwithstanding any other provision of law, no report, list, schedule or survey compiled by or for a State for the purposes of complying with any requirement of Title 23, United States Code, or the Highway Safety Act of 1973 concerning the evaluation of hazardous roadway conditions or rail-highway crossings in order to plan and prioritize projects to enhance safety, shall be required to be made available under 5 USC 552 (Freedom of Information Act), or admitted to evidence or used for any other purpose in any suit or action for damages arising out of any matter mentioned in such report, list, schedule or survey."

It is the intent of this provision to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of Federal-aid highway programs to eliminate or reduce hazardous roadway conditions. (e.g. 23 USC 152 and Sec. 203 of the Highway Safety Act of 1973). It is also the intent to protect information that may be compiled by railroads or utility companies for States in identifying hazards in connection with these programs. Precedent for such protection is found in Sec. 220(f) of the Interstate Commerce Act (49 USC 320(f), recodified as 49 USC 504(f).

We will be pleased to provide any additional assistance that may be necessary to implement this recommendation.

Marshall Jacks, Jr.

Federal Highway Administration
HSA-1.1:PLBrennan:jam:5/4/83:x662528
Copies to:
HSA-1
Reader - 3403
HSA-3
DF (Legislation) - 3401
HSA-1.1

Supreme Court, U.S.
FILED
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(2)

NO. 90-1412

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

State of Alabama Highway Department,
Petitioner,
v.
Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr.; Shirley Ann Boone, individually; Shirley Ann Boone on behalf of Kelley Lee Boone, the minor child and dependent of Vernon Dale Boone, Jr.; Southern Railway Company; The Alabama Great Southern Railroad Company; and Norfolk Southern Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are documents compiled in connection with highway safety improvement projects discoverable even though Congress mandated under 23 U.S.C. § 409 that such documents "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages"?

PARTIES BELOW

Parties in the Supreme Court of Alabama were petitioner State of Alabama Highway Department and respondents Southern Railway Company; Norfolk Southern Corporation; The Alabama Great Southern Railroad Company; Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr., deceased; Shirley Ann Boone, individually; Shirley Ann Boone, on behalf of Kelley Lee Boone, minor child of Vernon Dale Boone, Jr., City of Leeds, Alabama, and the Honorable William J. Wynn, Jefferson County, Alabama, Circuit Court Judge.

Subsidiaries and related corporations of Norfolk Southern Corporation, Southern Railway Company, whose name has been changed since the proceeding below to Norfolk Southern Railway Company, and The Alabama Great Southern Railroad Company include Norfolk and Western Railway Company; Atlanta and East Carolina Railway Company; Camp Lejeune Railroad Company;

Central of Georgia Railroad Company; Chesapeake Western Railway; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Georgia Northern Railway Company; Georgia Southern and Florida Railway Company; Live Oak, Perry and South Georgia Railway Company; New Orleans Terminal Company; State University Railroad Company; North American Van Lines; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; and Triple Crown Services, Inc.

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No. 90-1412

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

State of Alabama Highway Department,

Petitioner,

v.

Shirley Ann Boone, as Administratrix of the Estate of Vernon Dale Boone, Jr.; Shirley Ann Boone, individually; Shirley Ann Boone on behalf of Kelley Lee Boone, the minor child and dependent of Vernon Dale Boone, Jr.; Southern Railway Company; The Alabama Great Southern Railroad Company; Norfolk Southern Corporation; and City of Leeds, Alabama,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF RESPONDENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The respondents Southern Railway Company, The Alabama Great Southern Railroad Company, and Norfolk Southern Corporation respectfully request that this Court grant the State of Alabama Highway Department's petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Alabama is reported at 572 So. 2d 389. Petition, page A-1. The unreported order of the Jefferson County, Alabama, Circuit Court is printed in the Appendix of the Petition at page A-3.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered September 21, 1990. Petition, page A-1. The timely petition for rehearing of petitioner State of Alabama Highway Department was overruled by the Supreme Court of Alabama on December 7, 1990. Petition, page A-4-5. The

petition for writ of certiorari was timely filed by the State of Alabama Highway Department with this Court on March 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES INVOLVED

The focus of this petition for certiorari is 23 U.S.C. § 409, which provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Related statutes include 23 U.S.C. §§ 130, 144, and 152, which are set forth in the Appendix to the Petition at pages A-6 et seq.

STATEMENT OF THE CASE

Respondents adopt by reference the Statement of the Case in the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The issue set forth in the Petition for a Writ of Certiorari is an important issue which needs to be addressed by this Court because of the error of the court below. In addition to the opinions cited in the Petition, other courts construing similar statutes have agreed that such language as that found in 23 U.S.C. § 409 precludes both the discovery and the admissibility of the protected documents. Finally, as stated in the Petition, the decision of the Alabama Supreme Court frustrates the federal purpose of protecting from disclosure documents provided to states to assist them in ful-

filling their federally mandated duty to identify, evaluate or plan the safety enhancement of railroad grade crossings.

REASONS FOR GRANTING THE WRIT

I. The Issue Set Forth in the Petition for a Writ of Certiorari is of Vital Importance to all States.

The issue of whether documents compiled in connection with highway safety improvement projects which by Congressional mandate under 23 U.S.C. § 409 "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages" are nevertheless discoverable is of great significance to every state in the United States.

Federal law requires states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d) (Petition, p. A-7). This task is enormous, and could not be accomplished

without the cooperation of railroads and other citizens with respect to the gathering of information by the states. Congress recognized this and encouraged the free flow of information by adopting a statute which would make privileged all documents provided to the states in the fulfillment of their federally mandated duty. The holding of the Alabama Supreme Court rejects federal law and requires the disclosure of these privileged documents. This Court should grant the State of Alabama Highway Department's Petition and reverse the holding of the opinion below.

The process of determining which rail-highway intersections "require separation, relocation, or protective devices" of necessity involves conducting diagnostic studies at crossings and collecting "reports, surveys, schedules, lists, or data" from every possible source. 23 U.S.C. § 409. The process also requires state employees to make decisions with respect to thousands of railroad crossings. Because of the

limitation of money and manpower, obviously some crossings will be modified or improved sooner than will others.

States quickly realized that in the process of carrying out the federal mandate "to identify those railroad crossings which may require separation, relocation, or protective devices," they and their employees were going to be embroiled, if not subject to, litigation. Many states were afraid that the data they collected for the purpose of identifying and prioritizing highway hazards could be obtained and used against them in lawsuits. Quite simply, the state highway departments wanted to obtain the most information available to carry out their required duties, but understood the process was being frustrated by their own reluctance and the reluctance of others because of the likelihood that discussions and decisions about hazardous conditions or conditions which might be improved might expose them to liability.

23 U.S.C. § 409 was enacted to remove these obstacles to the accomplishment of the purposes of the Federal

Highway Safety Acts. Decisions such as was entered by the lower court in this case frustrate the intended purpose of Section 409 and jeopardize the entire federally mandated program regarding railroad crossings. This error should be corrected by this Court and the petition for a writ of certiorari sought by the State of Alabama Highway Department should be granted.

The importance of the issue of whether the documents described in Section 409 are privileged was great enough to be addressed by Congress in a federal law. Money and efforts of those involved in seeking to improve railroad grade crossings pursuant to a federal program are wasted by the ruling of the court below because the attention of those involved in the federal program is diverted to responding to the exigencies of civil litigation. This is but another example of the Supreme Court of Alabama ignoring the Supremacy Clause of the United States Constitution and should be corrected.

II. The Holding of the Alabama Supreme Court is Contrary to the Holdings of Other Courts Construing Similar Statutes.

The State of Alabama Highway Department in its Petition pointed out to the Court those opinions which have specifically considered Section 409, and correctly pointed out that this statute was intended to provide a privilege from both discovery and admissibility for the documents described therein. In addition to the decisions which have directly addressed Section 409, other courts in construing similar statutes have concluded that such statutes preclude the documents described from both discovery and admissibility. In ruling as it did, the Alabama Supreme Court rejected the sound reasoning of such opinions.

One such similar statute is 49 U.S.C. § 320(f):

> No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to any requirement of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used

> for any other purpose, in any suit or action for damages growing out of any matter mentioned in such report or investigation.

(Emphasis added) (49 U.S.C. § 320(f) has been repealed and incorporated into 49 U.S.C. § 504(f)).

In Craddock v. Queen City Coach Company, 141 S.E.2d 798 (N.C. 1965), the plaintiff sought discovery of a statement which had been given by a bus driver following an accident. The statement was a part of the report required by federal law to be filed with the Interstate Commerce Commission. Applying 49 U.S.C. § 320(f), the Supreme Court of North Carolina held that the plaintiff was "not entitled to a copy of the report made by defendant's bus driver . . . for the purpose of making the report required by law to the I.C.C." Id. at 801. The court explained:

> In our opinion, since the above statute prohibits the introduction in evidence, or use for any other purpose, of any report made to the I.C.C. in any suit or action for damages growing out of any matter mentioned in such report, it would be violative of the spirit and purpose of the I.C.C. Act to require the defendant to

> give plaintiff the data upon which the I.C.C. report was based. To do so would make the protective provisions of the statute worthless.

141 S.E.2d at 800. Even so, to permit discovery of the documents protected under Section 409 as the Alabama Supreme Court has done in this case will cause the protective provisions of Section 409 to become "worthless."

In Irvine v. Safeway Trails, Inc., 10 F.R.D. 586 (E.D. Pa. 1950), plaintiffs sought "production of reports to the Interstate Commerce Commission." Id. at 587. The court stated that such reports were privileged under 49 U.S.C. § 320(f) and sustained the defendant's objection to the production of the reports. Id. at 587-88. Similarly, this Court, faced with a statute which is even broader than 49 U.S.C. § 320(f), should grant the petition and reverse the lower court, thus recognizing and giving full authority to Section 409.

In Blankenship v. General Motors Corporation, 428 F.2d 1006 (6th Cir. 1970), the Sixth Circuit Court of Appeals considered whether the plaintiff, an individual, could assert

the privilege provided by 49 U.S.C. § 320(f). The carrier which had prepared the report sought to use it at trial because it contained a damaging statement by plaintiff's decedent. The carrier argued that § 320(f) provided only "a limited privilege against disclosure which is exercisable only by the carrier filing the report and cannot be invoked by others." 428 F.2d at 1009. The Sixth Circuit disagreed:

> [The statute] states in a plain and unambiguous fashion that no report of an accident filed by a carrier 'shall be admitted as evidence, or used for any other purpose, in any suit . . . for damages growing out of any matter mentioned in such report. . . .' Without evidence of a contrary Congressional intent, the statute can only be read as a flat prohibition against the use of these reports or any part of them as evidence. Id.

In other words, it did not matter who asserted the privilege; the statute precluded use of the report. Similarly, Section 409 is a flat prohibition against the use or discovery of any of the documents described therein, regardless of whether the privilege is asserted by the State, the railroad or

an individual. The error of the Alabama Supreme Court and other courts which have failed to acknowledge the privilege provided in Section 409 should be corrected by this Court.

Section 409 is plain and unambiguous. Materials protected by it are not admissible and may not be considered for any other purpose, which surely means they cannot be discovered. This court should grant the petition for a writ of certiorari sought by the State of Alabama Highway Department and reverse the lower court.

CONCLUSION

That the purpose of Section 409 was to encourage full and frank disclosure of information between railroads, states and other parties and to protect state employees from the threat of litigation is clear. The enactment of this statute was a utilization of preemption under the Supremacy Clause so as to foster the greater public interest involved in an effective grade crossing safety program, by protecting the open communications necessary thereto. By its enactment, Congress

protected that public interest over any which might be involved in allowing lawsuits based on such reports, surveys and data, thus enabling the states to better fulfill their responsibilities under federal law in identifying those grade crossings in need of additional warnings, and planning and implementing improvements. Decisions such as those of the court below frustrate the Congressional purpose. The petition should be granted so that full consideration may be given to the issue raised by the State of Alabama Highway Department.

The petition for a writ of certiorari should be granted.

CRAWFORD S. MCGIVAREN, JR.
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(2)

No. 90-1412

Supreme Court, U.S.
FILED
APR 8 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ALABAMA HIGHWAY DEPARTMENT,
Petitioner,

vs.

SHIRLEY ANN BOONE, as Administratrix of the Estate of VERNON DALE BOONE, JR.; SHIRLEY ANN BOONE, individually; SHIRLEY ANN BOONE on behalf of KELLEY LEE BOONE, the minor child and dependent of VERNON DALE BOONE, JR.; SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; NORFOLK SOUTHERN CORPORATION; and CITY OF LEEDS, ALABAMA,
Respondents.

Petition For A Writ of Certiorari To The Supreme Court of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 90-1412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF ALABAMA HIGHWAY DEPARTMENT,

Petitioner,

VS.

SHIRLEY ANN BOONE, as Administratrix of the Estate of VERNON DALE BOONE, JR.; SHIRLEY ANN BOONE, individually; SHIRLEY ANN BOONE on behalf of KELLEY LEE BOONE, the minor child and dependent of VERNON DALE BOONE, JR.; SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; NORFOLK SOUTHERN CORPORATION; and CITY OF LEEDS, ALABAMA,

Respondents.

Petition For A Writ of Certiorari To The Supreme Court of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Shirley Ann Boone respectfully requests that the Court deny the Petition for a Writ of Certiorari to review the decision of the Supreme Court of Alabama rendered on September 21, 1990.

STATEMENT OF JURISDICTION

This Honorable Court should not exercise jurisdiction in this case because Petitioner has not propounded an important question of federal law which should be settled by this Court, nor has Petitioner presented to the Court a federal question that conflicts with the decision of another state court of last resort or which has been decided in a way that conflicts with applicable decisions of this Court. Sup. Ct. R. 10.1.

STATEMENT OF THE CASE

Respondent agrees with the recitation of pertinent events which are set forth in Petitioner's statement of the case, but objects to all argument contained therein.

REASONS FOR DENYING PETITION

There is no special or important reason for this Court to entertain this petition for writ of certiorari: *Every* published opinion which has addressed this issue is in accord with the holding by the Alabama Supreme Court. The Alabama Supreme Court has decided a federal question, but not in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor conflicts with applicable decisions of this Court. Sup. Ct. R. 10.1(b). The plain meaning of 23 U.S.C. § 409, its legislative history, and judicial construction given a similar statute obviate that the Alabama Supreme Court correctly held that documents compiled pursuant to 23 U.S.C. § 409 are discoverable.

I. The Plain Meaning of the Language Contained in 23 U.S.C. § 409 Does Not Obviate a Congressional Intent to Bar the Discoverability of the Documents Referred to in the Statute.

The starting point for interpreting a statute is the language of the statute itself, and absent a clearly expressed legislative intent to the contrary, the language is conclusive. *Birmingham Trust Nat. Bank v. Case*, 755 F.2d 1474 (11th Cir. 1985). Section 409 expressly bars the admissibility of certain documents, and to this extent, federal law attempts to preempt the Alabama law of evidence. However, it is certainly not clear that Section 409 preempts Ala. R. Civ. P. 26 regarding the discoverability of such materials. Before Congress can intrude upon an area traditionally occupied by the states, its intent to preempt must be clear. *Jones v. Rath Packing Co.*, 430 U. S. 519 (1977). Certainly, "[a] state's regulation of its court system is ... as fundamental a function of its sovereignty as the normal exercise of its police power even in matters concerning the health and safety of its citizens." *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435, 438 (La.App. 1988), *cert. den.*, __ U.S. __, 109

S.Ct. 3164 (1989). Thus, Section 409 must be construed restrictively so that Congress may intrude only so much as it has expressly prescribed. *See Martinolich, supra* at 438.

The phrase, "considered for other purposes," cannot be construed as barring the discoverability of the specified documents because the term "consider" does not accurately describe what parties do in conducting discovery. "Consider" is defined as follows: "1. to think about seriously; 2. To regard as: deem; 3.To judge: believe." Webster's II New Riverside Dictionary 152 (1984). Furthermore, under a familiar rule of statutory construction known as "noscitur a sociis," the intent of a specific word may become clear by reference to the other words associated with it in a statute. *United States v. LaBrecque*, 419 F.Supp. 430 (D.C.N.J. 1976). Obviously, the term "considered for other purposes" read in context with "shall not be admitted into evidence in Federal or State Court or ...," refers to a trier of fact's consideration of the enumerated documents. Section 409 plainly prevents a trier-of-fact from "considering" the specified documents during a trial; the term suggests that a trial court may not allow opinions expressed in such documents to be conveyed to the trier-of-fact in such a way that such trier-of-fact "thinks about seriously" or "judges" such information.

II. The Legislative History of 23 U.S.C. § 409 Reveals No Congressional Intent to Bar the Discovery of Documents Referred to in the Statute.

In order to overcome intent expressed in the plain meaning of a statute, a contrary legislative intent must be clear and convincing. *In re The Bible Speaks*, 69 B.R. 368 (Bankr. D. Mass. 1987). Yet, the legislative history of 23 U.S.C. § 409 indicates that Congress did not intend to bar the discovery of the specified reports, surveys, data, schedules and lists. On April 25, 1984, a bill was introduced in the U. S. House of Representatives which contained the following:

SEC. 118 USE OF CERTAIN REPORTS AS EVIDENCE

> Notwithstanding any other provision of law, no report, list, schedule or survey prepared by or for a State pursuant to section 152 of title 23, United States Code, or section 203 of the Highway Safety Act of 1973 shall be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey.

H.R. 5504, 98th Cong., 2d Session (1984). The House Report on the bill stated as follows:

> *Section 118 - Use of Certain Reports as Evidence*
>
> Section 118 prohibits the introducing into evidence of any priority listing of roadside or rail-highway crossing hazards prepared pursuant to section 152 of title 23, U.S. Code (hazard elimination), and section 203 of the Highway Safety Act of 1978 (Rail-Highway Crossings). This is to encourage greater accuracy and completeness in the compilation of such lists, by preventing these lists from being used in any judicial proceeding, thereby improving their quality as a basis for programming.

H.R. Rep. No. 98-768, 98th Cong., 2d Session (1984). No mention is made of barring the discovery of such materials. This bill did not become law.

The House Conference Report on Section 409 briefly summarizes Section 409 and is entitled, "Use of Reports as Evidence." H.R. Rep. No. 100-28, 100th Cong., lst Sess., *reprinted in* 1987 U.S. CODE CONG. & AD. NEWS 156. And the title given Section 409 in the United States Code is "Admission as evidence of certain reports and surveys."

In its brief, Petitioner often refers to policies behind the adoption of Section 409 which necessitate the barring of certain

documents from discovery. Yet Petitioner's citation of sources is extremely lacking. Only one cited source actually states that documents compiled pursuant to Section 409 should not be disclosed and this source is an internal memorandum written by an official of the United States Department of Transportation, Marshall Jacks. Brief of Petitioner, A-57. This self-serving memorandum represents merely Mr. Jack's personal view and not that of Congress, and as such, the memorandum is entitled to no weight in determining Congressional intent. *See Sutherland v. Egger*, 865 F.2d 56 (3rd Cir. 1989).

III. Every Published Decision which Has Considered this Issue Has Held that Documents Compiled Pursuant to Section 409 are Discoverable.

The Alabama Supreme Court's decision is in accord with every published decision which has considered this issue: *Hagerty v. Southern Ry. Co.*, 133 F.R.D. 34 (E.D. Mo. 1990); *Indiana Dept. of Transportation v. Overton*, 555 N.E.2d 510 (Ind.App. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435 (La.App. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied*, _ U.S. _, 109 S.Ct. 3164 (1989); *Light v. State of New York*, 560 N.Y.S.2d 962 (N.Y. Ct.Cl. 1990).

Additionally, other courts which have considered Section 409 apparently assumed that documents compiled pursuant to the statute are discoverable. *See Taylor v. St. Louis Southwestern Ry.*, 746 F.Supp. 50 (D. Kan. 1990); *Hickey v. Union Pacific R.R.*, 104 Or. App. 724, 803 P.2d 275 (1990); *Duncan v. Union Pacific R.R.*, 790 P.2d 595 (Utah App. 1990).

IV. An Analogous Statute to Section 409, 49 U.S.C. app. 1441(e)(1982), has been Construed to Allow Discovery and to Allow Admissibility Into Evidence in Certain Circumstances.

49 U.S.C. app. 1441(e)(1982) states as follows:

> No part of any report or reports of the National Transportation Safety Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Most courts which have construed this statute have held that reports of the National Transportation Safety Board are not only discoverable, but are also admissible if such documents do not reflect any conclusions as to a probable cause of an accident. *See, e.g., Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845 (10th Cir. 1986); *Travelers Ins. Co. v. Riggs*, 671 F.2d 810 (4th Cir. 1982); *Berguido v. Eastern Airlines Inc.*, 317 F.2d 628 (3rd Cir.), *cert. denied*, 375 U.S. 895 (1963); *In re Air Crash Disaster at Stapleton Int'l*, 720 F.Supp. 1493 (D. Colo. 1989). Most courts have generally agreed that

> the purpose of the statute was to bar admission of conclusions or opinions more properly left to a jury rather than to establish a privilege encouraging full disclosure to the investigating agency. *Citation omitted.* The legislative history of the statute demonstrates its purpose was to prevent usurpation of the jury's role by evidentiary use of the Board's conclusions as to probable cause. This purpose is served by the exclusion of conclusions regarding the probable cause of an accident ....

In re Air Crash Disaster at Stapleton Int'l, supra at 1496.

These National Transportation Safety Board reports deal with specific accidents. Their discoverability and admissibility

strengthens the argument for the discoverability of documents compiled pursuant to Section 409, since the documents compiled pursuant to Section 409 deal only with the characteristics of the railroad crossing or other highway locations, and not to the accident at issue. A reasonable construction of Section 409 allows not only the discovery of such documents, but also allows their admissibility when such admission will not usurp the jury's role in determining an accident's proximate cause.

Petitioner's assertion that allowing discovery of Section 409 documents will "chill honest and robust analysis" is misplaced. Allowing pertinent, reliable information to be concealed under the guise of promoting a more accurate reporting of potentially hazardous highway locations is unacceptable. This suppression of information greatly prejudices a claimant's chances to fully determine and present all facts relevant to his claim.

CONCLUSION

The petition for writ of certiorari should be denied. Petitioner simply does not raise a federal question appropriate for review by this Court.

Respectfully submitted,

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Respondents.

Petition for a Writ of Certiorari
to the Supreme Court of the State of Alabama

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

Petition for a Writ of Certiorari
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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioner State of Alabama Highway Department submits this Reply Brief in response to Respondent Shirley Ann Boone's Brief in Opposition to Petition for Writ of Certiorari. Petitioner respectfully submits that the Petition for Writ of

Certiorari concerns an important question of federal law and should be granted. This Reply Brief addresses arguments raised in said Respondent's Brief.

REASONS FOR GRANTING THE WRIT

I. Respondent Shirley Ann Boone's Argument As to the Plain Meaning of 23 U.S.C. § 409 Supports Petitioner's Petition for Writ of Certiorari.

Respondent contends that Section 409 refers to "a trier of fact's consideration of the enumerated documents" and concludes that it does not permit that consideration but does permit discovery. The Alabama Supreme Court specifically required the trial judge to *consider* the documents covered by Section 409 and determine whether they are discoverable. The trial court was ordered to "determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial." Petition, A-1. This order mandates the *consideration* of the documents by the trial court, which *consideration* is expressly forbidden by Section 409. As a result, the petition should be granted and the order of the Alabama Supreme Court reversed.

II. Respondent Shirley Ann Boone's Reliance on 49 U.S.C. app. § 1441(e) is Misplaced.

Respondent's reliance on 49 U.S.C. app. § 1441(e) to argue that 23 U.S.C. § 409 should be construed to permit discovery is misplaced. 49 U.S.C. app. § 1441(e) is a very different statute from Section 409 and is distinguishable in at least four ways. These distinctions make it clear that the result under the two statutes with respect to discovery is different.

First, the scope of documents protected by the two statutes is different. 49 U.S.C. app. § 1441(e) applies only to the "report or reports of the National Transportation Safety Board relating to

any accident or the investigation thereof" and not to the data collected by the NTSB. Section 409 encompasses

> reports, surveys, schedules, lists or data compiled for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.

Thus, while the NTSB statute only addresses specific reports prepared by the NTSB, Section 409 declares an encompassing privilege for all underlying data and resultant reports described therein. Because the scope of documents protected by the two statutes is so dissimilar, reliance on any analogy between them is misplaced.

Second, specific regulations under 49 U.S.C. app. § 1441(e) and certain related statutes explain what the privilege under that statute means. *See* 49 C.F.R. §§ 801.13, 801.50-801.59, 802.1-802.20, 831.6, 831.12, 831.13, 835.1-835.9 (1990). Indeed, the "report of the National Transportation Safety Board" has been defined by regulation in 49 C.F.R. § 835.2 (1990) as "the report containing the Board's determinations, including the probable cause of an accident . . .." That is, by regulation, the privilege under 49 U.S.C. app. § 1441(e) is limited to that report which contains the Board's determinations. With this definition, it is no surprise that courts have generally allowed the discovery of documents not containing such determinations.

On the other hand, no such regulations exist under Section 409, nor need any be promulgated. Section 409 is plain that the documents described therein may neither "be admitted into evidence . . . or considered for other purposes," which obviously includes discovery. The only thing which needs to be done is for

this Court to correct the erroneous interpretations given to Section 409 by the Alabama Supreme Court and other courts which have refused to recognize the clearly stated privilege from both admissibility and discovery.

Third, as pointed out by Respondent (Brief in Opposition at 7-8), 49 U.S.C. app. § 1441(e) covers reports on accidents which have already occurred. However, this difference weakens Respondent's argument that documents under 23 U.S.C. § 409 should be discoverable. In contrast, Section 409 is concerned with documents which deal, not with past accidents, but with a future course of conduct for identifying and improving, or not, potentially hazardous conditions. Obviously, a report which found that a particular location was hazardous enough to warrant improvement (but perhaps only after other projects were completed) could expose the maker of the report to potential liability or involvement in future accidents at that location. Congress was concerned that persons dutifully trying to make the highways of this country safer for the public be protected and so passed a law which made all reports privileged from both discovery and admissibility.

Fourth, the primary purpose of 49 U.S.C. app. § 1441(e) is different from the primary purpose of 23 U.S.C. § 409. The essential thrust of Section 1441(e) is to "prevent usurpation of the jury's role by evidentiary use of the Board's conclusions as to probable cause." *In re Air Crash Disaster at Stapleton Int'l*, 720 F. Supp. 1493, 1496 (D. Colo. 1989). In contrast, the purpose of Section 409 was to "foster the free flow of safety related information between the railroad industry and its regulatory bodies by precluding the possibility that such information would be discoverable and admissible in civil suits." *Bearden v. Southern Railway*, CV88-PT-0005-S, slip op. (N.D. Ala. July 11, 1988) (memorandum opinion) (Petition, p. A-36-37).

Respondent's reliance on 49 U.S.C. app. § 1441(e) is misplaced, because of the significant differences between that statute and Section 409. Section 409 should be given its full due.

CONCLUSION

The petition for writ of certiorari should be granted. The federal question raised by the petition is of great significance to the Petitioner and to all state highway departments.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether 23 U.S.C. 409, which provides that documents or data compiled in connection with federally funded highway safety programs "shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages" arising out of a highway accident, bars discovery of such documents and data in an action for damages.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. In 1989, 45,555 persons died in traffic accidents in the United States. Despite continuing safety improvements, traffic accidents remain the leading cause of death in the United States for persons less than 38 years old. In addition, traffic accidents result in more permanent injuries than any other type of accident. In 1989, more than 3.6 million persons were injured in traffic accidents in the United States. United States Dep't of Transportation, *The 1991 An-*

nual Report on Highway Safety Improvement Programs, at II-1 (Apr. 1991) [hereinafter *1991 Annual Report*].

The Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282 (codified as amended at 23 U.S.C. 101 *et seq.*), established federal programs to reduce the number and severity of traffic accidents by funding improvements to hazardous highway locations. Under the Rail-Highway Crossings Program (23 U.S.C. 130), the federal government provides funds to States and local governments to reduce or eliminate hazards at railroad-highway crossings. Since 1974, the Rail-Highway Crossings Program has funded more than 25,300 projects, "primarily for the installation of signs and markings, flashing light signals, automatic gates, and surface improvements." *1991 Annual Report*, at IV-3. As a result of the program, "[f]atal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates have been reduced by 88, 62, and 66 percent, respectively." *Id.* at IV-5. The Department of Transportation (DOT) estimates that the program has saved over 6,400 lives and prevented 26,500 nonfatal injuries. *Ibid.*

A second federal program, the Hazard Elimination Program (23 U.S.C. 152), provides funds for safety improvements on public highways. Since 1974, the Hazard Elimination Program has provided funds for more than 30,000 safety improvement projects, such as "improving traffic signals, improving traffic channelization, installing guardrail and median barriers, widening the traveled-way and/or shoulders, improving pavement skid resistance, and placing or upgrading pavement markings." *1991 Annual Report*, at IV-3. The program "has provided * * * reductions

in * * * fatal, nonfatal injury, and combined fatal-plus-nonfatal injury accident rates * * * [of] 48, 24, and 25 percent, respectively." *Id.* at IV-5. DOT estimates that the program has prevented over 19,000 deaths and 520,000 nonfatal injuries. *Ibid.*

As an essential part of these federally financed safety programs, the States are required to compile data identifying and evaluating potential accident sites and hazardous highway conditions. Under the Rail-Highway Crossings Program, each State is required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d). Under the Hazard Elimination Program, each State is required to "conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement." 23 U.S.C. 152(a).[1]

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[1] In addition, 23 U.S.C. 144 establishes a program to provide federal funds to replace or rehabilitate highway bridges that are "significantly important" and "unsafe because of structural deficiencies, physical deterioration, or functional obsolescence." 23 U.S.C. 144(a). Under this program, the Secretary of Transportation, in consultation with the States, inventories bridges within the scope of the program, classifies them "according to serviceability, safety, and essentiality for public use," and assigns each bridge a priority for replacement or rehabilitation. 23 U.S.C. 144(b)(2).

In the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132, 101 Stat. 170, Congress enacted a comprehensive prohibition against the use in tort litigation of documents and data compiled in connection with federal highway safety programs. Section 132 of the Act provides, in part:

> PROHIBITION AGAINST DISCLOSURE AND ADMISSION AS EVIDENCE OF STATE REPORTS AND SURVEYS.
>
> * * * * *
>
> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. 409.

2. On August 28, 1988, a train collided with a tractor trailer truck at a railway-highway grade crossing in Leeds, Alabama. The driver of the truck was killed. Respondents brought a wrongful death action in state court against the railroad and the City of Leeds.

In February 1990, respondents subpoenaed petitioner's entire file on the grade crossing where the accident occurred. Pet. App. A22-A23. Petitioner agreed to produce certain documents in its file that were not compiled for the purpose of identifying, evaluating, or planning safety improvements, but objected to producing other documents in the file on the ground that they were protected by 23 U.S.C. 409. Pet. App. A24-A25.

The state trial court granted respondents' motion to compel production of the withheld documents. Pet. App. A3. The court interpreted Section 409 as "a bar as to admissibility and/or consideration by any court, tribunal or body which is empowered to 'consider' evidence and law, in arriving at a finding," but not "as a bar to[] the discoverability only of materials the subject of said United States Code Section." Pet. App. A3.

3. The Supreme Court of Alabama denied a petition for a writ of mandamus. Pet. App. A1-A2. The court ordered petitioner to produce the subpoenaed documents to the trial court in camera, "so that the trial court can determine which of the records, if any, are germane to any matters upon which the plaintiffs might pursue further discovery of evidence that may be admissible at trial." *Id.* at A1.

Three justices dissented. Pet. App. A2. The dissenting justices concluded that Section 409 "is a complete bar to the admissibility or discovery" of documents or data within its scope. *Ibid.* They reasoned that this result "is mandated by the language of the statute itself," as well as "the purpose behind 23 U.S.C. § 409." *Ibid.*

Respondents' wrongful death action has been stayed pending resolution of the discovery dispute at issue in this case. See Pet. 3.

DISCUSSION

The decision of the Alabama courts in this case is inconsistent with the language, legislative history, and purpose of 23 U.S.C. 409. Section 409 broadly prohibits any consideration of documents and data compiled in connection with federal highway safety programs in actions for damages. That prohibition extends to a party's consideration of materials obtained through discovery as well as to a factfinder's consideration of materials admitted into evidence at trial. If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, States and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs—which depend on information about safety problems supplied by the States and private entities such as railroads—will be jeopardized. In light of the importance of the question presented in this case to federal programs intended to promote highway safety, we believe that it is appropriate for the Court to grant the petition for certiorari.

1. Statutory interpretation begins with the language of the statute itself. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991). Where the language of the statute is clear, "the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). The plain language of 23 U.S.C. 409 provides not only that covered "reports, surveys, schedules, lists, or data * * * shall not be admitted into evidence in Federal or State court," but also

that they shall not be "considered for other purposes in any action for damages arising from any occurrence at a location mentioned in such reports, surveys, schedules, lists, or data." 23 U.S.C. 409. By its plain terms, this language prohibits *any* consideration of covered materials for *any* purpose, including consideration by a party who obtains such materials through discovery.

Respondents contend (Br. in Opp. 4) that a party who obtains covered materials in discovery does not "consider" such materials. That simply is not so. To "consider" is "to reflect on" or to "think about with a degree of care or caution." *Webster's Third New International Dictionary* 483 (1986). Indeed, " 'consider' often indicates little more than *think about*," although "[i]t may occasionally suggest somewhat more conscious direction of thought, somewhat greater depth and scope, and somewhat greater purposefulness." *Ibid.* Thus, Section 409 accurately describes what a party to a lawsuit does with materials obtained in discovery—it considers the materials and their possible bearing on the issues in litigation.

Respondents nevertheless assert (Br. in Opp. 4) that the statutory phrase "or considered for other purposes," read in context, must "refer[] to a trier of fact's consideration of the enumerated documents" rather than consideration of those documents by a party to the lawsuit. This reading of the statutory language is untenable. It is a basic principle of evidence that "[t]he fact issues at the trial should be decided upon the facts 'in the record,' i.e., facts officially introduced in accordance with the rules of practice, and facts which the court may judicially notice." E. Cleary, *et al.*, *McCormick on Evidence* § 51, at 122 n.1 (3d ed. 1984). Section 409's requirement that materials within its scope "not be admitted into evi-

dence" is sufficient to prevent such materials from being officially introduced, and facts contained in Section 409 documents would rarely if ever be appropriate for judicial notice. Thus, the purpose respondents would assign to the statute is fully met by the language specifying that covered documents and data "shall not be admitted into evidence in Federal or State court." 23 U.S.C. 409. But the statute does not stop there. It goes on to provide that covered materials may not be "considered for other purposes." 23 U.S.C. 409. Respondents' reading would render the phrase "or considered for other purposes" surplusage, contrary to the rule that courts "are obliged to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979).

Nor is there any basis for the suggestion that the "or considered for other purposes" language refers to limited or specialized uses of Section 409 materials at trial, such as to impeach a witness. See *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435, 439 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490 U.S. 1109 (1989). To be sure, evidence may be admitted for some purposes (such as impeachment) but not for other purposes. See, *e.g.*, Fed. R. Evid. 105. But Section 409 expressly prohibits the admission of documents and data within its scope for *any* purpose, limited or otherwise.[2]

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[2] Respondents contend (Br. in Opp. 7-8) that 23 U.S.C. 409 is analogous to 49 U.S.C. App. 1441(e), which provides:

> No part of any report or reports of the National Transportation Safety Board [NTSB] relating to any accident or the investigation thereof, shall be admitted as evidence

In short, the plain language of Section 409 broadly prohibits any consideration of materials generated in connection with federally funded highway safety programs in actions for damages. That prohibition applies to a party's consideration of documents obtained in discovery as well as to a factfinder's consideration of documents admitted into evidence.[3]

2. Although there is no occasion to consult the legislative history when the language of the statute is plain, see *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. at 1163, the legislative history of Section 409 reinforces the conclusion that Congress did not intend to allow discovery of documents and data compiled in connection with federal highway safety programs.

The forerunner of Section 409 was a 1986 DOT recommendation that Congress amend Title 23 to provide that documents or data compiled in connection with federal highway safety programs "shall not be required to be made available pursuant to section 552 of title 5, United States Code, nor shall they be

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or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

Respondents' contention is incorrect. The NTSB's aviation accident reports are public documents. 49 U.S.C. App. 1441(a)(4); 49 C.F.R. 801.35. Thus, no question of their discoverability arises.

[3] Respondents note (Br. in Opp. 3-4) that "[b]efore Congress can intrude upon an area traditionally occupied by the states, its intent to preempt must be clear," and that therefore Section 409 "must be construed restrictively." Section 409, however, regulates the use of materials generated under federal programs—not "an area traditionally occupied by the states"—and in any event satisfies any clear statement requirement by expressly applying "in Federal or State court." Br. in Opp. 3; 23 U.S.C. 409.

admitted into evidence, or considered for other purposes, in any action for damages arising from any matter mentioned or addressed in such [documents] or data." DOT Draft Bill, *Surface Transportation Reauthorization Act of 1986*, § 130, at 55-56 (Feb. 5, 1986). The DOT's 1986 proposal, in turn, was based on similar DOT proposals prompted by concern that "highway departments are reluctant to [identify and prioritize roadway hazards] for fear that acknowledging the existence of hazardous conditions would expose them to liability." Memorandum from Marshall Jacks, Jr., Associate Administrator for Safety, Traffic Engineering, and Motor Carriers, to D.L. Ivers, Chief Counsel, Federal Highway Administration (May 4, 1983) (*reprinted at* Pet. App. A57-A58). DOT's section-by-section analysis of its 1986 proposal explained that it would require that covered materials not be "admitted into evidence *or used* in any action for damages." DOT Draft Bill, Section-By-Section Analysis at 31-32 (emphasis added). DOT thus understood the phrase "considered for other purposes" to be a broad prohibition against any use of covered materials in tort actions. Moreover, the fact that DOT proposed to prohibit release of covered materials under FOIA clearly demonstrates that the prohibition on "use" in litigation encompassed discovery.[4]

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[4] As ultimately enacted into law, Section 409 does not refer expressly to the Freedom of Information Act, 5 U.S.C. 552. Congress may have concluded that express reference to FOIA was unnecessary because Section 409 applies "[n]otwithstanding any other provision of law," 23 U.S.C. 409, and FOIA does not apply to matters that are "specifically exempted from disclosure by statute." Exemption 3, 5 U.S.C. 552(b)(3). In addition, disclosure of materials covered by Section 409 appears to be precluded by FOIA's Exemption 4

The House version of Section 409 provided that "[n]otwithstanding any other provision of law, no report, list, schedule, or survey prepared by or for a State pursuant to section 152 of title 23, United States Code, or section 203 of the Highway Safety Act of 1973 shall be admitted as evidence or used in any suit or action for damages arising out of any matter referred to in such report, list, schedule, or survey." H.R. 2, 100th Cong., 1st Sess. § 207 (1987).[5] The Senate version of Section 409, which is substantially similar to the version enacted into law, included the phrase "considered for other purposes" from the DOT's 1986 proposal. S. 387, 100th Cong., 1st Sess. § 124 (1987). The Senate Report's analysis of the provision, which is captioned "Prohibition Against Disclosure and Admission As Evidence of State Reports and Surveys," explains that no covered material "shall be required to be admitted

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(which exempts "commercial or financial information obtained from a person and privileged or confidential") and Exemption 5 (which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"). 5 U.S.C. 552(b)(4) and (5). In any event, most documents and data within the scope of Section 409 are in the custody of state agencies rather than the federal government.

[5] There was no House Report accompanying H.R. 2. The House Report cited by petitioner (Pet. 12) describes H.R. 3129, 99th Cong., 1st Sess. (1985), passed by the House in 1986, which provided that covered materials shall not be "admitted into evidence or used in any suit or action for damages." The House Report that accompanied H.R. 3129 explained that the purpose of the provision "is to encourage greater accuracy and completeness * * * by preventing [the materials] from being used in any judicial proceeding, thereby improving their quality as a basis for programming." H.R. Rep. No. 665, 99th Cong., 2d Sess. 56 (1986).

into evidence or used in any action for damages arising from matters mentioned or addressed in such documents." S. Rep. No. 4, 100th Cong., 1st Sess. 27-28 (1987). Similarly, the Conference Report states that the House bill was "[s]imilar to [the] Senate Amendment," and repeats that the effect of Section 409 is to prevent covered materials from being "admitted into evidence or used in any action for damages arising from matters mentioned or addressed in such documents." H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 172-173 (1987). Thus, Congress clearly intended to preclude any use of materials within the scope of Section 409 in actions for damages, including use by a party to the litigation who obtains Section 409 materials through discovery.

3. The Alabama courts' interpretation of Section 409 is also inconsistent with the purpose of the statute. In enacting Section 409, Congress recognized that state highway departments, as well as private entities such as railroads, are reluctant to compile detailed and accurate information about highway safety problems if there is a significant risk that the information will be used against them in actions for damages arising out of highway accidents. Cf. *United States* v. *Weber Aircraft Corp*, 465 U.S. 792, 802-803 (1984) (recognizing "a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations"). Simply barring the admission into evidence of materials gathered in the process of such evaluations, while allowing discovery of such materials, would not prevent enterprising plaintiffs from making effective use of the materials in an action for damages. As one court has observed, there is merit to the argument that "[t]he disclosure of 409 materials is merely the first step in a backdoor process that leads to the de facto admission in sum

or substance in one form or another of the information in question." *Light* v. *New York*, 149 Misc. 2d 75, 79, 560 N.Y.S.2d 962, 964 (Ct. Cl. 1990).

Indeed, the general rule is that privileged matter is not subject to discovery. See, *e.g.*, Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant."); Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."). In many cases, plaintiffs may be able to replicate information obtained through discovery in an admissible form simply by using Section 409 materials as a blueprint for questioning in depositions. In other cases, plaintiffs may conduct their own studies, patterned after studies conducted by the States, to recreate Section 409 materials. The fact that respondents and other parties to lawsuits have devoted considerable effort to obtaining Section 409 material indicates that the material is quite useful in litigation, even if not itself admissible.

4. The question presented in this case is of considerable importance to the success of federal highway safety programs. Congress enacted Section 409 because it concluded that States and private entities such as railroads were reluctant to provide complete and accurate information about highway safety problems that is essential to federally funded highway safety programs.

The question presented is not only important, but is certain to recur frequently. In 1989, there were 682 fatal accidents, and 2,600 nonfatal accidents, involving motor vehicles at rail-highway crossings alone. *See 1991 Annual Report*, at II-13 to II-14. In the relatively short time since this Court declined to consider this issue in *Martinolich* v. *Southern Pac. Transp. Co.*, 532 So. 2d 435 (La. Ct. App. 1988), writ denied, 535 So. 2d 745 (La.), cert. denied, 490

U.S. 1109 (1989), it has been addressed in at least three published decisions in addition to this case. See *Hagerty* v. *Southern Ry.*, 133 F.R.D. 34 (E.D. Mo. 1990); *Light* v. *New York*, 149 Misc. 2d 75, 560 N.Y.S. 2d 962 (Ct. Cl. 1990); *Indiana Dep't of Transp.* v. *Overton*, 555 N.E.2d 510 (Ind. Ct. App. 1990).

Petitioner has attached to its petition copies of five unpublished decisions—two by federal district courts and three by state trial courts—holding that Section 409 bars discovery of documents and data within its scope. See Pet. App. A35-A56. These decisions conflict with other decisions holding that Section 409 imposes no limitations on discovery. See *Hagerty* v. *Southern Ry., supra*; *Light* v. *New York, supra*; *Indiana Dep't of Transp.* v. *Overton, supra*; *Martinolich* v. *Southern Pac. Transp. Co., supra*. We recognize that there is as yet no conflict among federal courts of appeals or state courts of last resort, but the sharp conflict in the lower courts nevertheless reveals significant confusion over the application of Section 409 to discovery. In addition, several of the courts that have allowed discovery have expressed some doubt about the correctness of that result. See *Hagerty*, 133 F.R.D. at 36 (discoverability question "is far from being settled"); *Light*, 149 Misc. 2d at 79, 560 N.Y.S.2d at 964 (recognizing "facial merit" to argument that "[t]he disclosure of 409 materials is merely the first step in a backdoor process that leads to de facto admission"); *Martinolich*, 532 So. 2d at 439 ("The meaning of 'or considered for other purposes' . . . is not clear."). The confusion in the lower courts is exemplified by the conflict between the decision of the Alabama state courts in this case and a decision of the United States District Court for the Northern District of Alabama holding that Section

409 bars discovery. *See Bearden* v. *Southern Ry.*, No. CV88-PT-0005-S (July 11, 1988), *reproduced at* Pet. App. A35-A38.

This case presents a single, straightforward question of statutory interpretation. It is unlikely that additional lower court decisions will shed further light on the question presented. Moreover, we believe the decision of the Alabama courts in this case is incorrect. Because further delay will jeopardize the effectiveness of federal programs intended to promote highway safety without serving any useful purpose, we believe it is appropriate for the Court to resolve the question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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